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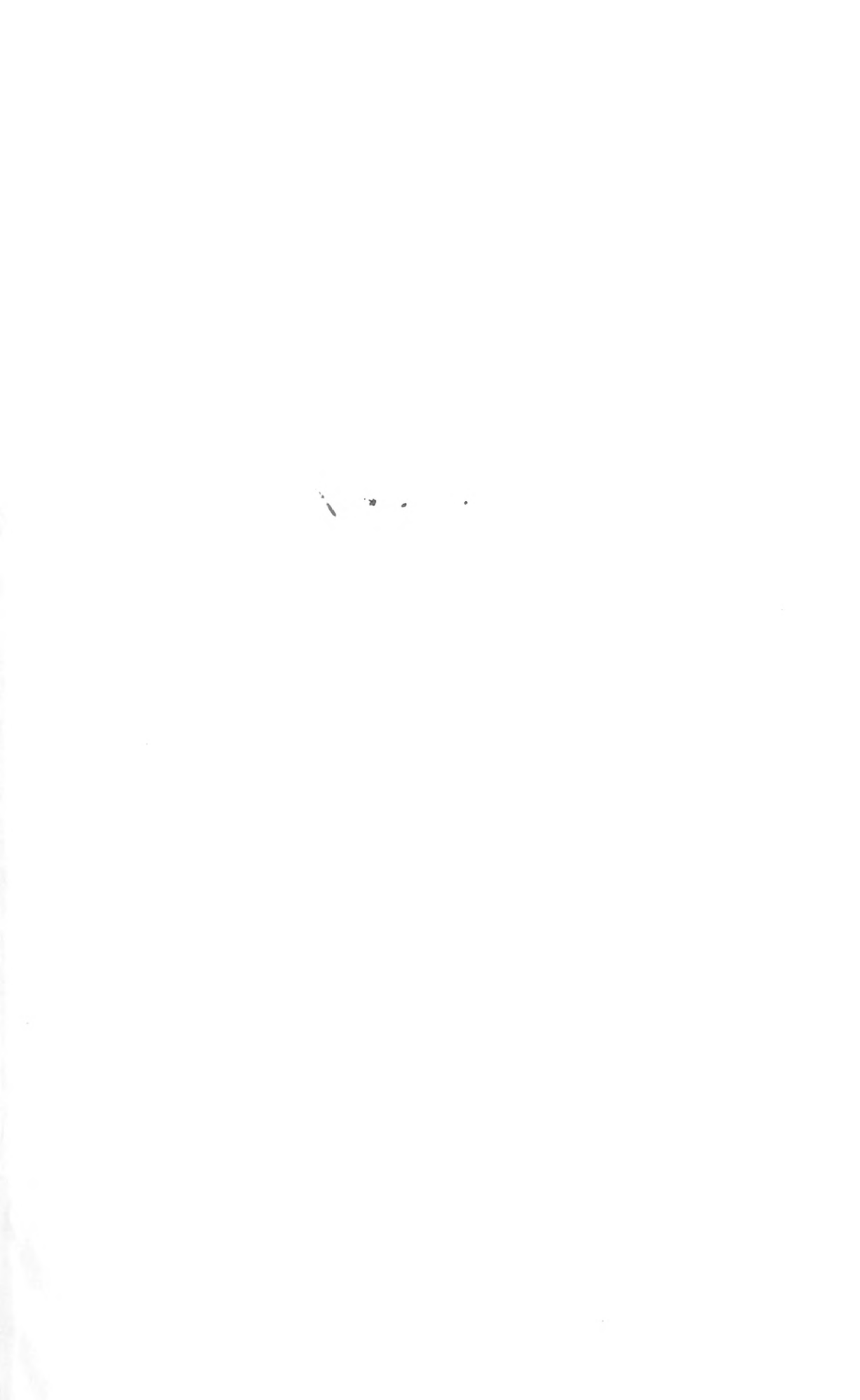
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**No. 11668**

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

WILLIAM A. CARMICHAEL, District Director, Immigration and Naturalization Service, United States Department of Justice, District 16,

Appellant,

vs.

WONG CHOON HOI,

Appellee.

---

## TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division

---

FILED

SEP 26 1947

PAUL P. O'BRIEN,

CLERK



No. 11668

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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WILLIAM A. CARMICHAEL, District Director, Immigration and Naturalization Service, United States Department of Justice, District 16,

Appellant,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

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United States Attorney,

RONALD WALKER,  
Assistant United States Attorney,

600 U. S. Post Office and Court House Bldg.  
Los Angeles 12, Calif.

For Appellee:

BENJAMIN W. HENDERSON

417 South Hill Street  
Los Angeles 13, Calif. [1\*]

Original

73

(To be retained by  
Clerk of Court)

No. 126123

UNITED STATES OF AMERICA  
PETITION FOR NATURALIZATION

[Of a Married Person, under Sec. 310 (a) ~~or~~ (b),  
~~311 or 312~~, of the Nationality Act of 1940 (54  
Stat. 1144-1145)]

To the Honorable the District Court of The United States  
at Los Angeles, Calif.

This petition for naturalization, hereby made and filed  
pursuant to Section 310(a) ~~or~~ (b), or ~~Section 311 or~~  
~~312~~, of the Nationality Act of 1940, respectfully shows:

(1) My full, true, and correct name is Wong Choon  
Hoi

(Full, true name, without abbreviation, and any other name which  
has been used, must appear here)

(2) My present place of residence is 1606 Court St.  
(Number and street)  
Los Angeles, 26, Cal. (3) My occupation is Merchant  
(City or town) (County) (State)

(4) I am 31 years old. (5) I was born on July 7,  
(Month) (Day)  
1914, in Hen-Kong-Hoiping, China  
(Year) (City or town) (County, district, province, or state (Country)

(6) My personal description is as follows: Sex male;  
color yellow complexion med. color of eyes brn, color  
of hair blk, height 5 feet 5 inches, weight 160 pounds;  
visible distinctive marks scar above bridge of nose;  
scars on jaw & neck; race white; present nationality  
China



(7) I am married; the name of my wife or husband is June; we were married on Oct. 5, 1941 at Los Angeles,  
 (Month) (Day) (Year) (City or town)  
 Cal.; he or she was born at Hoi Sun, China, on.....  
 (State or country) (City or town) (County, district, (Country) (Month) (Day)  
 province, or state)  
 1925 entered the United States at San Pedro, Cal.  
 (Year) (City or town) (State)  
 on Sept. 20, 1935 for permanent residence in the United  
 (Month) (Day) (Year)  
 States, and now resides at with me and was naturalized  
 (Number and street) (City or town) (State or country)  
 on..... at.....  
 (Month) (Day) (Year) (City or town) (State)  
 certificate No.....; or became a citizen by a citizen  
 by birth abroad to an American citizen

(7a) (If petition is filed under Section 311, Nationality Act of 1940) I have resided in the United States in marital union with my United States citizen spouse for at least 1 year immediately preceding the date of filing this petition for naturalization.

(7b) (If petition is filed under Section 312, Nationality Act of 1940) My husband or wife is a citizen of the United States, is in the employment of the Government of the United States, or of an American institution of research recognized as such by the Attorney General of the United States, or an American firm or corporation engaged in whole or in part in the development of foreign trade and commerce of the United States, or a subsidiary thereof; and such husband or wife is regularly stationed abroad in such employment. I intend in good faith to take up residence within the United States immediately upon the termination of such employment abroad.

(8) I have  $\approx$  3 children; and the name, sex, date and place of birth, and present place of residence of each of said children who is living, are as follows: Daniel (m) 8-9-42-Calif; res. with me; Linda (f) 11-9-43-Calif; res. with me John (m) 8-9-45-Calif; res. with me.

(9) My last place of foreign residence was Hen-Kong,  
(City or town)

China (10) I emigrated to the United States from  
(County, district province, (Country)  
or state)

Hongkong China (11) My lawful entry for permanent  
(City or town) (Country)

residence in the United States was at San Pedro, Calif.  
(City or town) (State)

under the name of Choon Hoi Wong As the son of a  
Merchant under S c.3(6) of the Immigration Act of  
1924 on Nov. 24, 1934 on the SS Pres. Coolidge as  
(Month) (Day) (Year) (Name of vessel or other means of  
conveyance)

shown by the certificate of my arrival attached to this  
petition.

(12) Since my lawful entry for permanent residence  
I have not been absent from the United States, for a  
period or periods of 6 months or longer, as follows:

\* \* \* \* \*

(13) (Declaration of intention not required) (14) It  
is my intention in good faith to become a citizen of the  
United States and to renounce absolutely and forever all  
allegiance and fidelity to any foreign prince, potentate,  
state, or sovereignty of whom or which at this time I am  
a subject or citizen, and it is my intention to reside perma-  
nently in the United States. (15) I am not, and have not  
been for the period of at least 10 years immediately pre-

ceding the date of this petition, an anarchist; nor a believer in the unlawful damage, injury, or destruction of property, or sabotage; nor a disbeliever in or opposed to organized government; nor a member of or affiliated with any organization or body of persons teaching disbelief in or opposition to organized government. (16) I am able to speak the English language (unless physically unable to do so). (17) I am, and have been during all of the periods required by law, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States. (18) I have resided continuously in the United States of America for the term of 3 year.... at least immediately proceeding the date of this petition, to wit: since Nov. 24,  
(Month) (Day)

1934 (19) I have not heretofore made petition for nat-  
(Year)

uralization number..... on.....at.....  
(Month) (Day) (Year) (City or town)

..... in the .....  
(County) (State) (Name of court)

Court, and such petition was dismissed or denied by that Court for the following reasons and causes, to wit:.....

..... and the cause of such dismissal or denial has since been cured or removed.

(20) Attached hereto and made a part of this, my petition for naturalization, are a certificate of arrival from the Immigration and Naturalization Service of my said lawful entry into the United States for permanent residence (if such certificate of arrival be required by the naturalization law), and the affidavit of at least two verifying witnesses required by law.

(21) Wherefore, I, your petitioner for naturalization, pray that I may be admitted a citizen of the United States of America, and that my name be changed to Harry "H" Wong

(22) I, aforesaid petitioner, do swear (affirm) that I know the contents of this petition for naturalization subscribed by me, that the same are true to the best of my own knowledge, except as to matters therein stated to be alleged upon information and belief, and that as to those matters I believe them to be true, and that this petition is signed by me with my full, true name: So Help Me God.

WONG CHOON HOI

(Full, true and correct signature of petitioner, without abbreviation)

bms [2]

### AFFIDAVIT OF WITNESSES

The following witnesses, each being severally, duly, and respectively sworn, depose and says:

My name is Isabel Cholakian my occupation is Nursery Home I reside at 1863 Blake Ave. Los Angeles,  
 (Number and street) (City or town)  
 Calif.  
 (State)

My name is Jimmy L. Wong my occupation is Clerk I reside at 1606 Court St. Los Angeles, Calif.  
 (Number and street) (City or town) (State)

I am a citizen of the United States of America; I have personally known and have been acquainted in the United States with Wong Choon Hoi, the petitioner named in the petition for naturalization of which this affidavit is a part, since Aug. 1942 to my personal knowledge the  
 (Month) (Day) (Year)

petitioner has resided, immediately preceding the date of filing this petition, in the United States continuously since the date last mentioned, and I have personal knowledge that the petitioner is now and during all such period has been a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States, and in my opinion the petitioner is in every way qualified to be admitted a citizen of the United States.

I do swear (affirm) that the statements of fact I have made in this affidavit of this petition for naturalization subscribed by me are true to the best of my knowledge and belief: So Help Me God.

ISABEL CHOLAKIAN.

(Signature of witness)

JIMMY L. WONG.

(Signature of witness)

Subscribed and sworn to before me by the above-named petitioner and witnesses, in the respective forms of oath shown in said petition and affidavit, in the office of the Clerk of said Court at Los Angeles, Cal. this 4th day of Sept., Anno Domini 1945. I hereby certify that Certificate of Arrival No. 23 133432 from the Immigration and Naturalization Service, showing the lawful entry for permanent residence of the petitioner above named, has been by me filed with, attached to, and made a part of this petition on this date.

EDMUND L. SMITH,

Clerk U. S. District Court, Southern District of  
California.

By Geo. E. Ruperich,  
Deputy Clerk.



OATH OF ALLEGIANCE

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So Help Me God. In acknowledgment whereof I have hereunto affixed my signature.

WONG CHOON HOI

(Signature of Petitioner)

\* \* \* \* \*

Note.—In renunciation of title or order of nobility, add the following to the oath of allegiance before it is signed: “I further renounce the title of (give title or titles) which I have heretofore held,” or “I further renounce the order of nobility (give the order of nobility) to which I have heretofore belonged.”

Petition granted: Line No..... of List No. 6641237 and Certificate No.....issued.

Petition denied: List No..... 3-4-47

Petition continued from..... to .....  
Reason.....

[Stamped]: Seal of U. S. District Court, Southern District of California. [3]

No. 23 133432

CERTIFICATE OF ARRIVAL

I Hereby Certify that the immigration records show that the alien named below arrived at the port, on the date and in the manner shown, and was lawfully admitted to the United States of America as the son of a merchant under Sec. 3(6) of the Immigration Act of 1924.

Name: Choon Hoi Wong

Port of entry: San Pedro, California

Date: November 24, 1934

Manner of arrival: SS President Coolidge

I Further Certify that this certificate of arrival is issued under authority of and in conformity with the provisions of the Nationality Act of 1940 solely for the use of the alien herein named and only for naturalization purposes.

In Witness Whereof this Certificate of Arrival is issued July 10, 1945.

[Stamped] DEPARTMENT OF JUSTICE

UGO CARUSI

Commissioner

cg

[Endorsed]: Filed Sep. 4, 1945. [4]

In the District Court of the United States  
Southern District of California

Central Division

No. 246/P/126123

In the Matter of the Petition of  
WONG CHOON HOI  
for Naturalization

MEMORANDUM OF DECISION

Wong Choon Hoi, a native-born Chinese, has filed his petition to be naturalized as a citizen of the United States. The petition is predicated upon the claim that petitioner resided continuously in this country for more than three years immediately preceding the filing of his petition, is married to a citizen of the United States, and has met all other requirements specified in §310(b) of the Nationality Act of 1940. [8 U.S.C. §710(b).]

There is no controversy as to the facts. Petitioner's father, Wong Yung San, a Chinese merchant, was admitted to this country in 1922 pursuant to Article II of the Treaty of 1880 between the United States and China. Petitioner was admitted in 1934 as an unmarried minor child of a resident [5] Chinese "treaty trader."

Both father and son have resided here continuously since their respective entries, and both are merchants engaged in trade. In 1941 petitioner married a born citizen of the United States. In 1943 Chinese persons were made eligible for naturalization by amendment to §303 of the Nationality Act of 1940. [8 U.S.C. §703.]

Section 310(b) provides that: "Any alien who, on or after May 24, 1934, has married or shall hereafter marry

a citizen of the United States . . . may, if eligible for naturalization, be naturalized upon full and complete compliance with all requirements of the naturalization laws, with the following exceptions: (1) No declaration of intention shall be required; (2) In lieu of the five-year period of residence within the United States, and the six months' period of residence in the State where the Petitioner resided at the time of filing the petition, the petitioner shall have resided continuously in the United States for at least three years immediately preceding the filing of the petition." [8 U.S.C. §710(b).]

The Commissioner of Immigration and Naturalization opposes the petition urging: that the three-years' "residence" [6] specified in §310(b) could only be acquired following admission for permanent residence, that petitioner's entry was not for permanent residence, but was made pursuant to §3(6) of the Immigration Act of 1924 [8 U.S.C. §203(6)], hence for temporary residence.

I am unable to perceive any sound basis for the Commissioner's opposition. Precedent of long standing holds that where, as in the proceeding at bar, a Chinese merchant was admitted to this country prior to 1924 pursuant to the Treaty of 1880, members of his family (wife and unmarried minor children) coming after 1924 are entitled to be admitted for permanent residence by virtue of the Treaty. [Cheung Sum Shee v. Nagle, 268 U. S. 336 (1925); Haff v. Yung Poy, 68 F. (2d) 203 (C. C. A. 9th, 1933).]

These decisions are to be respected as determining the character of residence for which petitioner was admitted. The fact that Chinese persons were ineligible for naturalization until the 1943 amendment cannot affect the char-

acter of that residence. [Petition of Chi Yan Cham Louie, No. 39,067 (W. D. Wash., unreported decision of Judge Black, August 29, 1946).]

Long before the Nationality Act of 1940, Chinese merchants admitted to engage in business here pursuant to the [7] Treaty of 1880 were referred to as “domiciled” in this country. [Cheung Sum Shee v. Nagle, *supra*, 268 U. S. at p. 344; United States v. Mrs. Gue Lim, 176 U. S. 459 (1900); Lau Ow Bew v. United States, 144 U. S. 47 (1892); Wong Yow v. Weedin, 33 F. (2d) 377 (C. C. A. 9th, 1929); Woo Hoo v. White, 243 Fed. 541 (C. C. A. 9th, 1917).]

The term “residence”, as used in the naturalization statutes, is practically synonymous with “domicile.” [Petition of Wright, 42 F. Supp. 306, 307 (E. D. Mich., 1941; United States v. Parisi, 24 F. Supp. 414, 419 (D. C. Md., 1938); Petition of Oganessoff, 20 F. (2d) 978, 980 (S. D. Cal., 1927); United States v. Shanahan, 232 Fed. 169, 172 (E. D. Pa., 1916).]

Being a minor when he entered this country, petitioner acquired at that time the domicile of his father. There has been no suggestion of any act or expression of intent indicating change of domicile either before or after petitioner became emancipated upon attaining majority.

Indeed all the facts in evidence are to the contrary. Petitioner has been present and engaged in business in this country for twelve years and more since his admission for permanent residence. During the past five years



he has been married to a citizen of the United States by birth, and is now the father of three children born in this country. [8]

Accordingly it must be held that petitioner has more than met the three-year residence requirement of §310(b) of the Nationality Act of 1940. The petition of Wong Choon Hoi is granted.

February 17, 1947.

WM. C. MATHES  
United States District Judge

[Endorsed]: Filed Feb. 17, 1947. [9]

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Book 10 Page 333

Date March 4, 1947 List No. 1

This list consists of two sheets. Sheet No. 1.

NATURALIZATION PETITIONS  
RECOMMENDED TO BE DENIED

To the Honorable the District Court of the United States sitting at Los Angeles, Calif.

H. B. Terrill, K. Parker duly designated under the  
(Name(s) of designated officer(s))

Nationality Act of 1940 (54 Stat. 1156) to conduct preliminary hearings upon petitions for naturalization to the above-named Court and to make findings and recommendations thereon, has personally examined under oath at a preliminary hearing the following two (2) petitioners for

naturalization and their required witnesses, has found for the reasons stated below, that such petitions should not be granted, and therefore recommends that such petitions be denied.

No.	Petition No.	Name of Petitioner	Reason for Denial
1	4079-M	Josip Bozin	Petitioner was not law-fully admitted to the United States as contemplated by Section 701 of the Nationality Act as amended.
2			
3			
4			
5			
6			
7			
8	126123	Wong Choon Hoi	(1) There was not filed with the petition a valid certificate showing the date, place and manner of the petitioner's arival in the United States, and (2) that petitioner has failed to establish continuous legal residence in the United States for the period required by law.
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\* \* \* \* \*

Respectfully submitted,  
F. J. BURNS  
(Signature of officer in attendance at final hearing)

Date March 4, 1947. [10]

Original

Book 10 Page 334

Date March 4, 1947 List No. 1

This list consists of two sheets. Sheet No. 2

ORDER OF COURT

State of California

County of Los Angeles—ss:

In the District Court of the United States

Upon consideration of the petitions for naturalization listed on List No. 1 (sheet(s) 1 to dated March 4, 1947, presented in open Court this 4th day of March, A. D., 1947, It Is Hereby Ordered that each of the said petitions be, and hereby is, denied, ~~except those petitions listed below.~~

Recommendation of Designated Officer Is Disapproved as to the Petitions listed Below, and each of said petitioners so listed having appeared in person, It Is Hereby Ordered that each of them be, and hereby is, admitted to become a citizen of the United States of America. Prayers for change of name listed below granted, ~~except in petition(s) No. ....~~

Petition No.	Name of Petitioner	Change of Name
1 4079-M	Josip Bozin	Joe Bozin
2 126123	Wong Choon Hoi	Harry H. Wong
*	*	*

It is further ordered that petitions listed below be continued for the reasons stated.

Petition No.	Name of Petitioner	Cause for Continuance
*	*	*

By the Court.

WM. C. MATHES

Judge. [11]

[Title of District Court and Cause]

### NOTICE OF APPEAL

You Will Please Take Notice that William A. Carmichael, District Director, Immigration and Naturalization Service, United States Department of Justice, District 16, the respondent and appellant herein, hereby appeals to the United States Circuit Court of Appeals for the 9th Circuit from the Judgment and Order of the above-entitled District Court entered March 4, 1947, and from the whole thereof, granting the petition for naturalization of said Wong Choon Hoi.

JAMES M. CARTER

United States Attorney

RONALD WALKER

Assistant United States Attorney

Attorneys for Respondent and Appellant

[Endorsed]: Filed & mld. copy to Ben Henderson, atty. for petnr., Jun. 3, 1947. [12]

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[Title of District Court and Cause]

### ORDER DIRECTING CLERK TO MAKE CERTIFICATION OF NATURALIZATION RECORDS.

It appearing that William A. Carmichael, District Director, Immigration and Naturalization Service, United States Department of Justice, District 16, the respondent and appellant herein, has filed a notice of appeal on June 3, 1947, in the above matter and is now in the process of

perfecting said appeal; and it also appearing that under Section 341(e) of the Nationality Act of 1940 (Title 8 USC 74(e)) the Clerk is prohibited from making certification of naturalization records without an order of Court; and good cause appearing therefor

It Is Hereby Ordered that the Clerk of this Court issue its certification of the following naturalization records in the above-entitled action, to wit:

1. Petition for Naturalization.
2. Certificate of Arrival.
3. Recommendation of denial of citizenship by the Immigration and Naturalization Service.
4. Order of Court granting petition for naturalization dated March 4, 1947. [15]

Dated this 25th day of June, 1947.

WM. C. MATHES

District Judge

[Endorsed]: Filed Jun. 25, 1947. [16]

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[Title of District Court and Cause]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 18 inclusive contain full, true and correct copies of Petition for Naturalization; Certificate of Arrival;

Memorandum of Decision; Naturalization Petitions Recommended to be Denied; Order of Court; Notice of Appeal; Statement of Points on Appeal; Order Directing Clerk to Make Certification of Naturalization Records and Stipulation for Record on Appeal which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 26th day of June, A. D. 1947.

(Seal)

EDMUND L. SMITH,

Clerk,

By Theodore Hocke,  
Chief Deputy Clerk.

TH/a

[Endorsed]: No. 11668. United States Circuit Court of Appeals for the Ninth Circuit. William A. Carmichael, District Director, Immigration and Naturalization Service, United States Department of Justice, District 16, Appellant, vs. Wong Choon Hoi, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed Jun. 27, 1947.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the Circuit Court of Appeals of the United States

In and for the Ninth Circuit

No. 11668

WILLIAM A. CARMICHAEL, District Director, Immigration and Naturalization Service, United States Department of Justice, District 16,

Appellant

v.

WONG CHOON HOI,

Appellee

### STATEMENT OF POINTS ON APPEAL

Comes Now Appellant William A. Carmichael, District Director, Immigration and Naturalization Service, United States Department of Justice, District 16, and files herewith his statement of the points on which he intends to rely on the appeal in the above matter:

1. The District Court erred in holding and deciding that petitioner was admitted to the United States for permanent residence under the Treaty of Commerce and Navigation with China in 1888 (22 Stat. 826) for naturalization purposes.

2. The District Court erred in holding and deciding that petitioner's admission to the United States constituted lawful permanent residence for naturalization purposes.

3. The District Court erred in failing to hold and decide that petitioner was admitted to the United States temporarily as a non-immigrant alien under Section 3(6) of the Act of May 26, 1924, Title 8 USC 203).

4. The District Court erred in admitting petitioner to citizenship.

Dated this 8th day of July, 1947.

JAMES M. CARTER,  
United States Attorney

RONALD WALKER  
Assistant United States Attorney  
Attorneys for Appellant

Received copy of the within documents this 2nd day of July, 1947. Benjamin W. Henderson, Attorney for Appellee, by Sue Ganser.

[Endorsed]: Filed Jul. 1, 1947. Paul P. O'Brien, Clerk.



No. 11668

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

WILLIAM A. CARMICHAEL, District Director, Immigration  
and Naturalization Service, United States Department  
of Justice, District No. 16;

*Appellant,*

*vs.*

WONG CHOON HOI,

*Appellee.*

---

## APPELLANT'S BRIEF.

---

JAMES M. CARTER,  
*United States Attorney;*

RONALD WALKER,  
*Assistant United States  
Attorney,*

United States Postoffice and  
Courthouse Bldg., Los Angeles (12),  
*Attorneys for Appellant.*

BRUCE G. BARBER,  
*Chief, District Adjudications Division  
Immigration and Naturalization Service,  
on the Brief.*

PAUL P. O'BRIEN,

CLERK



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No. 11668

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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WILLIAM A. CARMICHAEL, District Director, Immigration  
and Naturalization Service, United States Department  
of Justice, District No. 16,

*Appellant,*

*vs.*

WONG CHOON HOI,

*Appellee.*

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**APPELLANT'S BRIEF.**

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**Jurisdiction.**

The petition of the appellee for admission to citizenship under Section 310(b) of the Nationality Act of 1940 (54 Stat. 1145; 8 U. S. C. 710(b)) was filed in the United States District Court on September 4, 1945 [R. 2-7].

The jurisdiction to naturalize aliens as citizens of the United States is conferred upon the District Courts by Section 301(a) of the Nationality Act of 1940 (54 Stat. 1140; 8 U. S. C. 701(a)).

The decision of the District Court granting the petition was filed February 17, 1947 [R. 10-13], and order admitting appellee to citizenship was entered on March 4, 1947 [R. 15]. Notice of appeal was filed on June 3, 1947

[R. 16], and transcript of record was filed in this Honorable Court on June 27, 1947 [R. 18, 19].

Jurisdiction is conferred upon this Honorable Court to review the final judgments of the district courts of the United States by section 128 of the Judicial Code, as amended (Title 28, U. S. C., sec. 225(a)), wherein it is provided that “the Circuit Courts of Appeals shall have appellate jurisdiction to review by appeal, final decisions \* \* \* in the district courts,” except as otherwise provided.

The order of the District Court in granting the petition and admitting appellee to citizenship is a final decision within the meaning of the above law.<sup>1</sup>

### **Treaties, Proclamations, Statutes, and Regulations.**

Treaty between the United States and China, concerning immigration.<sup>2</sup>

“By the President of the United States of America.

#### **A PROCLAMATION.**

‘Whereas a Treaty between the United States \* \* \* and China, for the modification of the existing treaties between the two countries, by providing for the future regulation of Chinese immigration into the United States, was concluded and signed at Peking \* \* \* on the seventeenth day of November in the year of our Lord one thousand eight hun-

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<sup>1</sup>*Tutun v. U. S.*, 270 U. S. 568 46 S. Ct. 425, 70 L. Ed. 738; *U. S. v. Rodiek*, 162 Fed. 469 (9th Cir.).

<sup>2</sup>22 Stat. L. 826; concluded Nov. 17, 1880; ratification advised by the Senate May 5, 1881; ratified by the President May 9, 1881; ratifications exchanged July 19, 1881; proclaimed Oct. 5, 1881.



dred and eighty, \* \* \* which Treaty is word for word as follows:

‘Whereas, in \* \* \* 1858, a treaty of peace and friendship was concluded between the United States of America and China, and to which were added, in \* \* \* 1868, certain supplementary articles to the advantage of both parties, which supplementary articles were to be perpetually observed and obeyed:— and

‘Whereas the Government of the United States, because of the constantly increasing immigration of Chinese laborers to the territory of the United States, and the embarrassments consequent upon such immigration, now desires to negotiate a modification of the existing Treaties which shall not be in direct contravention of their spirit:—

‘Now, therefore, \* \* \* the said Commissioners Plenipotentiary, having conjointly examined their full powers, and having discussed the points of possible modification in existing Treaties, have agreed upon the following articles in modification:

### Article I.

‘Whenever, in the opinion of the Government of the United States, the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country or of any locality within the territory thereof, the Government of China agrees that the Government of the United States may regulate, limit, or suspend such coming or

residence, but may not absolutely prohibit it.<sup>3</sup> The limitation or suspension shall be reasonable, and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation, or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse.

## Article II.

*‘Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.*

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<sup>3</sup>Affected by various provisions of law, prohibiting the admission of Chinese laborers to the United States. By an Act of Congress of May 6, 1882, as amended and added to by the Act of July 5, 1884, enforcement of the Exclusion Treaty with China was provided for: “\* \* \* until the expiration of ten years next after the passage of this Act, the coming of Chinese laborers to the United States \* \* \* is \* \* \* suspended, and during such suspension it shall not be lawful for any Chinese laborer to come from any foreign port or place, or having so come, to remain within the United States.” (22 Stat. L. 58; 23 Stat. L. 115.) The Act of May 6, 1882, as amended and added to by the Act of July 5, 1884, was continued in force for an additional period of 10 years from May 5, 1892, by the Act of May 5, 1892 (27 Stat. L. 25); and was, with all laws on this subject in force on April 29, 1902, reenacted, extended, and continued without modification, limitation, or condition by the Act of April 29, 1902 (32 Stat. L. 176), as amended by the Act of April 27, 1904 (33 Stat. L. 428).

Article III.

‘If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill treatment at the hands of any other persons, the Government of the United States will exert all its power to devise measures for their protection and to secure to them the same rights, privileges, immunities, and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty.

Article IV.

‘The high contracting powers having agreed upon the foregoing articles, whenever the Government of the United States shall adopt legislative measures in accordance therewith, such measures will be communicated to the Government of China. If the measures as enacted are found to work hardship upon the subjects of China, the Chinese minister at Washington may bring the matter to the notice of the Secretary of State of the United States who will consider the subject with him; and the Chinese Foreign Office may also bring the matter to the notice of the United States minister at Peking and consider the subject with him, to the end that mutual and unqualified benefit may result.

‘In faith whereof the respective Plenipotentiaries have signed and sealed the foregoing at Peking,  
\* \* \* the ratification of which shall be exchanged at Peking within one year from date of its execution.

‘Done at Peking, this seventeenth day of November, in the year of our Lord, 1880. \* \* \*

‘And whereas the said Treaty has been duly ratified on both parts and the respective ratifications were exchanged at Peking on the 19th day of July 1881;

‘Now, therefore, be it known that I, Chester A. Arthur, President of the United States of America have caused the said Treaty to be made public to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof.

‘Done in Washington this fifth day of October in the year of our Lord one thousand eight hundred and eighty-one, \* \* \*.’”

The convention regulating Chinese immigration was concluded March 17, 1894, by which immigration of Chinese laborers was prohibited for ten years. By Article IV of that convention it was provided:

“In pursuance of Article III of the Immigration Treaty between the United States and China, signed at Peking on the 17th day of November, 1880 \* \* \* it is hereby understood and agreed that Chinese laborers or Chinese of any other class, either permanently or temporarily residing in the United States, shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation, *excepting the right to become naturalized citizens* \* \* \*.” (Italics added.)

By an amendment to “an act to execute certain treaty stipulations relating to Chinese,” Congress, on November 3, 1893, defined the term “merchant” as follows:<sup>4</sup>

“Sec. 2. \* \* \* the term ‘merchant,’ as employed herein and in the acts of which this is amendatory, shall have the following meaning and none other:

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<sup>4</sup>(28 Stat. L. 7.)

*‘A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who, during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant.’ ”*  
(Italics added.)

In the Act of November 3, 1893, Congress also defined a “Domiciled merchant” as follows:<sup>5</sup>

“Where an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish by the testimony of two creditable witnesses other than Chinese the fact that he conducted such business as hereinbefore defined for at least one year before his departure from the United States, and that during such year he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant, *and in default of such proof shall be refused landings.*” (Italics added.)

The Immigration Act of May 26, 1924, “to limit the immigration of aliens into the United States,” defines its scope:<sup>6</sup>

“Sec. 25. The provisions of this Act are in addition to and not in substitution for the provisions of the Immigration Laws, and shall be enforced as a part of such laws, \* \* \* not inapplicable, shall apply

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<sup>5</sup>Same as footnote 4.

<sup>6</sup>(43 Stat. 166; 8 U. S. C. 223.)

to and be enforced in connection with the provisions of this Act. An alien, although admissible under the provisions of this Act, shall not be admitted to the United States if he is excluded by any provision of the Immigration Laws other than this Act, and an alien, although admissible under the provisions of the Immigration Laws other than this Act, shall not be admitted to the United States if he is excluded by any provision of this Act."

The 1924 Immigration Act classifies all aliens entering the United States for permanent residence as "immigrants" and "non-quota immigrants," excepting from such definition those entering temporarily or during a period requiring the maintenance of status. This latter group is commonly referred to as "non-immigrants." The Statute is in the following language:<sup>7</sup>

"Sec. 3. *When used in this Act the term 'immigrant' means any alien departing from any place outside the United States destined for the United States, except, (1) an accredited official of a foreign government \* \* \*, (2) an alien visiting the United States \* \* \*, (3) an alien in continuous transit through the United States, (4) an alien lawfully admitted to the United States who later goes in transit from one part of the United States to another through foreign contiguous territory, (5) a bona fide alien seaman \* \* \*, and (6) an alien entitled to enter the United States solely to carry on trade between the United States and a foreign state of which he is a National under and in pursuance of the provisions of a treaty*

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<sup>7</sup>(43 Stat. 154; 47 Stat. 607; 54 Stat. 711; 8 U. S. C. 203; Sec. 7(c) Public Law 291, 79th Congress; Chap. 652.1, Sess., approved Dec. 29, 1945.)

*of commerce and navigation, and his wife, and his unmarried children under 21 years of age, if accompanying or following to join him \* \* \*, and (7) a representative of a foreign government in or to an international organization \* \* \* or an alien officer or employee of such \* \* \* organization, and the family, attendants, servants, and employees \* \* \*."*

Prior to amendment of July 6, 1932, the sixth subdivision of Section 3 read as follows:<sup>8</sup>

*"(6) An alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation."*

"Immigrant" as above defined and "non-quota immigrant" included in the following definition, constitute the classes of aliens whose admission to the United States is authorized for lawful permanent residence under the 1924 Immigration Act:<sup>9</sup>

"Sec. 4. When used in this Act the term 'non-quota' immigrant means—'(a) An immigrant who is

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<sup>8</sup>Act of July 6, 1932 (47 Stat. 607; 8 U. S. C. 203), amending Sec. 3, Act of May 26, 1924 (43 Stat. 154; 8 U. S. C. 203).

<sup>9</sup>(43 Stat. 155; 44 Stat. 812; 45 Stat. 1009; 46 Stat. 854; 47 Stat. 656; 8 U. S. C. 204.) The Sec. 4(e) student "nonquota immigrant" is by act of Congress specifically taken out of the class of aliens admitted for permanent residence by Sec. 15, Immigration Act of 1924 (43 Stat. 162; 47 Stat. 524, 525; 54 Stat. 711; 57 Stat. 669; 8 U. S. C. 215, Sec. 7(d), and is subject to deportation if he fails to maintain status under regulations promulgated thereunder providing "A student who violates or fails to fulfill any of the conditions of his admission \* \* \* shall be made the subject of deportation proceedings in accordance with the provisions of the applicable immigration laws \* \* \*" (Sec. 125.5, Title 8, C. F. R.)

the unmarried child under twenty-one years of age, or the wife, or the husband, of a citizen of the United States: Provided, that the marriage shall have occurred prior to issuance of visa and, in the case of husbands of citizens, prior to July 1, 1932.' '(b) An immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad.' '(c) An immigrant who was born in \* \* \* Canada, \* \* \* Mexico,' etc. '(d) An immigrant who \* \* \* seeks to enter the United States solely for the purpose of, carrying on the vocation of minister,' etc. '(e) An immigrant who is a *bona fide* student \* \* \* who seeks to enter the United States solely for the purpose of study,' etc. '(f) A woman who was a citizen of the United States and lost her citizenship by reason of her marriage to an alien,' etc."

Section 15 of the Immigration Act of 1924<sup>10</sup> requires maintenance of the exempt status of aliens admitted to the United States who are excepted from the "\* \* \* *Definition of Immigrant and nonquota immigrant.*"

"Section 15. The admission to the United States of an alien excepted from the class of immigrants by clause 1, 2, 3, 4, 5, 6 \* \* \* of section 3 \* \* \* shall be for such time, and under such conditions as may be by regulations prescribed \* \* \* to insure, that at the expiration of such time or upon failure to maintain the status under which admitted, he will depart from the United States \* \* \*."

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<sup>10</sup>(43 Stat. 162; 47 Stat. 524; 54 Stat. 711; 59 Stat. 669; 8 U. S. C. 215.)



The terms “status” and “trader’s status” as used in the Immigration Act of 1924, are defined in regulations promulgated by the Commissioner of Immigration and Naturalization with the approval of the Attorney General, as follows:<sup>11</sup>

“The term ‘status’ as used in the Immigration Act of 1924 means the condition of carrying on one of the particular limited activities for which an alien may be admitted under a subdivision of Section 3 of that Act (43 Stat. 154, 47 Stat. 607; 8 U. S. C. 203(e)). \* \* \* When applied to an alien \* \* \*; and the term ‘trader’s status’ means that he is admissible under Section 3 (6) and is an alien entitled to enter and to remain in the United States solely to carry on trade between the United States and the foreign state of which he is a national under and in pursuance of the provisions of a treaty of commerce and navigation, or the wife or unmarried child under 21 years of age of a person so entitled whom he accompanies or follows to join.”

Certain non-immigrants are admitted without time limitation so long as the status under which admitted is maintained.<sup>12</sup>

“The admission of the aliens [officials, visitors and traders] \* \* \* shall be \* \* \* on condition that the alien shall maintain during his temporary stay in the United States the specific status claimed, and shall voluntarily depart therefrom ‘at the expiration of the time fixed, or *upon failure to maintain the specific status under which admitted.* \* \* \*’

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<sup>11</sup>Sec. 110.27, Title 8, C. F. R., authorized by Sec. 24, Immigration Act of 1924 (43 Stat. 166; 8 U. S. C. 224).

<sup>12</sup>Sec. 110.29 (a), (b), (c), Title 8, C. F. R.

“(a) \* \* \* a government official and his family shall be admitted without limitation of time \* \* \*;  
(b) \* \* \* an alien having a trader’s status shall be admitted without limitation of time; (c) \* \* \* an alien who has been admitted as the unmarried minor child of a treaty trader shall be regarded as having maintained his specific status so long as his parent maintains his trader’s status.”

Rule 18, paragraph 5, of the Chinese Rules of October 1, 1926, promulgated by the Commissioner of Immigration, with the approval of the then Secretary of Labor, under authority contained in Section 24 of the Immigration Act of 1924, provided as follows:<sup>13</sup>

“Para. 5. Aliens who have been admitted as non-immigrants \* \* \* under Section 3 \* \* \* of the Immigration Act of 1924 \* \* \*, and aliens admitted under Section 3 (6) of said Act as non-immigrants (together with their alien wives and minor children admitted at the same time or subsequently) who shall fail or refuse to maintain the status under which admitted, or to depart voluntarily when they have ceased to maintain such status; shall be taken into custody upon the warrant of the Secretary of Labor and deported in the manner provided by Section 14 of the Immigration Act of May 26, 1924.”

Provision is made in the Immigration Act of 1924 for the deportation of<sup>14</sup>

“any alien who at any time after entering the United States is found \* \* \* to have remained therein

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<sup>13</sup>(43 Stat. 166; 8 U. S. C. 224.)

<sup>14</sup>Sec. 14, Immigration Act of 1924 (43 Stat. 162; 8 U. S. C. 214).

for a longer time than permitted under this Act or regulations made thereunder, shall be taken into custody and deported in the same manner as provided for in Sections 19 and 20 of the Immigration Act of 1917 \* \* \*

In enacting legislation for the repeal of the Chinese Exclusion Laws<sup>15</sup> the Congressional Committee, considering the legislation, had the following comment to make:<sup>16</sup>

*“The number of Chinese who will actually be made eligible for naturalization under this Section is negligible. There are approximately 42,000 alien Chinese persons in the United States (37,242 in continental United States and 4,844 in Hawaii, according to the census figures of 1940). However, a large number of these Chinese have never been admitted to the United States for lawful permanent residence, which is a condition precedent to naturalization and, therefore, many of this number would not be eligible for naturalization, not because of racial disability, but because they cannot meet existing statutory requirements of law. The number of Chinese who will be made eligible in the future, in addition to those already here, will of necessity be very small because the quota for China is limited to 105 per annum, as provided for in Section 2 of this bill.”*  
(Italics ours.)

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<sup>15</sup>On Dec. 17, 1943, Congress passed the Chinese Exclusion Repeal Act (57 Stat. 600).

<sup>16</sup>House Rep. 732; Sen. Rep. 535; 78th Congress, 1st Sess. (p. 6 of Sen. Rep. 535).

In discussing the purpose of the repeal of the Chinese Exclusion Acts the Congressional Committee made the following comment:<sup>17</sup>

“The purpose of this section is to repeal all of the laws enacted between 1882 and 1913, dealing with the exclusion and deportation of Chinese persons. It should be stated at this point that no substantial gain accrues to the Chinese people through the repeal of these laws from a standpoint of permitting Chinese to enter the country who are at present denied that privilege because other provisions of laws subsequently enacted effectively keep out persons of the Chinese race as well as persons of other races ineligible to citizenship. It does, however, eliminate the undesirable laws specifically designating Chinese as a race to be excluded from admission to the United States.”

The following provisions of the Nationality Laws and Regulations require, as a condition precedent to establishing a residence for naturalization purposes, that an alien be admitted for lawful permanent residence. At the time of the admission of the appellee into the United States the Naturalization laws required a registry of all aliens to be made.<sup>18</sup> As a prerequisite to the issuance

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<sup>17</sup>Sen. Rep. 535, 78th Congress, 1st Sess. (p. 3 referring to Sec. 1).

<sup>18</sup>Sec. 328(a), Nationality Act of 1940 (54 Stat. 1151-52; 8 U. S. C. 728), effective Jan. 13, 1941. The language in this section was derived from a similar provision in the basic Naturalization Act of June 29, 1906, which was recast herein without material change. See Chap. 3592, Sec. 1, 34 Stat. 596, which reads:

“That it shall be the duty of the Bureau of Immigration \* \* \* to provide, for use at the various Immigration stations throughout the United States, books of record, wherein the Commis-

of a valid declaration of intention the Nationality Act of 1940 requires that lawful entry for permanent residence be established.<sup>19</sup>

“No declaration of intention shall be made by any person who arrived in the United States after June 29, 1906, until such person’s *lawful entry for permanent residence* shall have been established, and a certificate showing the date, place, and manner of arrival in the United States shall have been issued. It shall be the duty of the Commissioner, or Deputy Commissioner, to cause to be issued such certificate.” (Italics ours.)

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sioners of Immigration shall cause a registry to be made in the case of each alien arriving in the United States from and after the passage of this Act, of the name, age, occupation \* \* \* the place of birth, the last residence, the intended place of residence in the United States, and the date of arrival of said alien, and \* \* \* the name of the vessel in which he comes.”

Historically, registry of aliens for naturalization purposes made its first appearance in the naturalization laws in the Act approved June 18, 1798 (1 Stat. 566-569) requiring: “\* \* \* that all \* \* \* aliens who, after the passing of this Act, shall continue to reside, or who shall arrive or come to reside in any part or place within the territory of the United States, shall be reported \* \* \* to the Clerk of the District Court of the District, if living within ten miles of the port or place, in which their residence or arrival shall be, and otherwise, to the Collector of such port or place, or some officer or other person there, \* \* \* who shall be authorized by the President of the United States, to register aliens; \* \* \* in respect to every alien who shall come to reside within the United States \* \* \* *the time of the registry of such alien shall be taken to be the time when the term of residence within the limits and under the jurisdiction of the United States, shall have commenced, in case of an application by such alien to be admitted as a citizen of the United States; and a Certificate of such registry shall be required in proof of the term of residence, by the Court to whom such application shall and may be made.*” (Italics added.)

<sup>19</sup>Sec. 329(b), Naturalization Act of 1940 (54 Stat. 1152; 8 U. S. C. 729).

The applicant, when declaring his intention for naturalization, must also swear to a recital of *lawful admission for permanent residence* in his declaration of intention.<sup>20</sup>

“An applicant for naturalization shall make, under oath \* \* \* substantially the following averments  
\* \* \* (11) *My lawful entry for permanent residence* in the United States was at (city or town) (State) under the name of . . . . . on (month, day, and year) on the (name of vessel or other means of conveyance.)” (Italics ours.)

The Nationality Act of 1940 requires that in the petition for naturalization the applicant also swear to a recital of lawful admission for permanent residence as follows:<sup>21</sup>

“An applicant for naturalization shall \* \* \* make and file in the Office of the Clerk of a Naturalization Court \* \* \* a sworn petition in writing, signed by the applicant \* \* \* which petition shall contain substantially the following averments by such applicant—(11) *My lawful entry for permanent residence in the United States* was at (City or town) (state) under the name of . . . . . on (month, day, and year) on the (name of vessel or other means of conveyance) *as shown by the Certificate of my arrival attached to this petition.*” (Italics ours.)

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<sup>20</sup>Sec. 331(a)(11), Naturalization Act of 1940 (54 Stat. 1153-54; 8 U. S. C. 731).

<sup>21</sup>Sec. 332(a)(11), Naturalization Act of 1940 (54 Stat. 1154-56; 8 U. S. C. 732).

Under regulations promulgated under the authority of the Attorney General, it is provided that an alien:<sup>22</sup>

“\* \* \* *in order to be eligible for naturalization upon a petition for naturalization to a Naturalization Court shall, unless specifically exempted as set forth in sub-chapter D of this title: (b) have been lawfully admitted to the United States for permanent residence.*” (Italics ours.)

### Statement of the Case.

Appellee filed his petition to become a citizen of the United States as the husband of a United States citizen, before the Clerk of the United States District Court on September 4, 1945 [R. 2-7]. As the husband of a citizen he was exempt from the requirement of declaring his intention.<sup>23</sup>

There was also filed with the petition for naturalization a “Certificate of Arrival” attesting that appellee had been lawfully admitted to the United States *as the son of a merchant under section 3 (6) of the Immigration Act of 1924.*<sup>24</sup>

On March 4, 1947, there was filed with the District Court a list of petitions recommended to be denied, in-

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<sup>22</sup>Sec. 322.1, Title 8, C. F. R., issued under authority of Sec. 327 of the Naturalization Act of 1940 (54 Stat. 1150; 8 U. S. C. 727).

<sup>23</sup>Sec. 310(b), Nationality Act of 1940 (54 Stat. 1145; 8 U. S. C. 710(b)).

<sup>24</sup>(43 Stat. 154; 8 U. S. C. 203).

cluding, under item 8, the name of appellee [R. 13-14]. The petition of appellee was heard in open court on March 4, 1947, and the recommendation of denial was disapproved by the Judge, who granted appellee's petition and admitted him to citizenship of the United States [R. 13-15]. Thereafter, on February 17, 1947, the Judge prepared a written decision in the case [R. 10-13].<sup>25</sup> Notice of appeal was filed with the Court on June 3, 1947 [R. 16].

### Summary of the Facts.

Appellee is a native and citizen of China, born July 7, 1914 [R. 2]. Appellee's father, Wong Yung San, was lawfully admitted to the United States in the year 1922, under the status of a Chinese merchant pursuant to Article II of the Treaty of 1880 between the United States and China [R. 10]. On November 24, 1934, appellee was lawfully admitted to the United States under the status of "son of a merchant under section 3 (6) of the Immigration Act of 1924."<sup>26</sup> [R. 9]. Ap-

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<sup>25</sup>See *Petition of Wong Choon Hoi*, 71 Fed. Supp. 160. See, also, C. C. A., 9th Circuit Docket No. 11551. *Bonham etc. v. Chi Yan Cham Louie* in which the facts differ in so far as material from the case at bar only in the circumstance that appellee therein was admitted to the United States prior to the amendment to Sec. 3(6) of the 1924 Act by the Act of July 6, 1932 (footnote 8, *supra*) whereas the present appellee was admitted after the said amendment, both appellees having entered this country after the effective date of the 1924 Act.

<sup>26</sup>Sec. 3(6), Act of 1924 (43 Stat. 154 as amended; 8 U. S. C. 203).



pellee and his father have continuously resided in the United States since their respective entries, and both follow the business profession of merchant [R. 2, 10]. On October 5, 1941, appellee married a native of China who derived citizenship by reason of her father's United States citizenship at the time of her birth. She took up permanent residence in the United States on September 20, 1935 [R. 3].

### Specification of Errors.

The District Court erred in holding and deciding that petitioner was admitted to the United States for permanent residence under the Treaty of Commerce and Navigation with China in 1880<sup>27</sup> for naturalization purposes.

The District Court erred in holding and deciding that petitioner's admission to the United States constituted lawful permanent residence for naturalization purposes.

The District Court erred in failing to hold and decide that petitioner was admitted to the United States temporarily as a non-immigrant alien under Section 3 (6) of the Act of May 26, 1924.<sup>28</sup>

The District Court erred in admitting petitioner to citizenship.

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<sup>27</sup>(22 Stat. L. 826.)

<sup>28</sup>(45 Stat. 154 as amended; 8 U. S. C. 203.)

## ARGUMENT.

### The Appellee Does Not Meet the Lawful Permanent Residence Requirement Which Is a Condition Precedent to Naturalization.

The facts are not in dispute and the sole issue is whether appellee's admission under the immigration and naturalization laws constitutes a "*lawful entry for permanent residence*"<sup>29</sup> (italics ours) within the meaning of the Nationality Act of 1940. No question is raised as to whether appellee has resided continuously in the United States for the required period of three years "immediately preceding the date of filing \* \* \* petition" for naturalization.<sup>30</sup> Lawful admission for permanent residence within the contemplation of the Nationality Laws does not include an entry which depends for its permanency and continued legal existence upon the maintenance of a particular status, as for example, an alien admitted under the immigration status of a recognized "accredited official

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<sup>29</sup>Secs. 328(a), 329(a)(b), 331, allegation (11), 332(a), allegation (11) and subdivisions (b) and (c), Nationality Act of 1940 (54 Stat. 1151-1152; 8 U. S. C. 728(a), (54 Stat. 1152; 8 U. S. C. 729(a)(b)), (54 Stat. 1153-1154; 8 U. S. C. 731, averment (11)), (54 Stat. 1154-1156; 8 U. S. C. 732(a), averment (11)(b)(c); Sec. 322.1, Title 8, C. F. R., provides that an alien "\* \* \* in order to be eligible for naturalization upon a petition for naturalization to a naturalization court shall \* \* \* : (b) *have been lawfully admitted to the United States for permanent residence.*" (Italics added.)

<sup>30</sup>Secs. 309(a) and 310(a) of the Nationality Act of 1940 (54 Stat. 1143; 8 U. S. C. 709; 54 Stat. 1144; 8 U. S. C. 710). These two sections refer to the continuity of residence to be maintained (under the general law for five years) immediately preceding the filing of the petition for naturalization. Being married to a United States citizen after 1934, appellee was required to establish but three years' residence and was exempt from the filing of the declaration of intention.

of a foreign government.”<sup>31</sup> Like the merchant,<sup>32</sup> his admission under the law is without specific time limitation so long as the legal status under which admitted of “accredited official” or “merchant” is maintained. Admission for lawful permanent residence as an “immigrant or nonquota immigrant”<sup>33</sup> carries no restrictions as to occupation, profession or limitation as to time. So long as an alien so admitted does not abandon his legal resident status thus acquired he is relieved from further obligation under the immigration laws. It is only the latter type of admission that will meet the requirements of the naturalization laws. *The starting point of residence prerequisite to naturalization is the entry of an alien under an immigration status for “lawful permanent residence,” evidence of which is the record of registry of entry from which a certificate of arrival may be issued certifying that the admission was for lawful permanent residence.* Concededly the question of whether a temporary absence breaks the continuity of the prescribed period of residence immediately preceding filing of the petition for naturaliza-

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<sup>31</sup>Sec. 3(1), Immigration Act of 1924 (43 Stat. 154; 47 Stat. 607; 54 Stat. 711; 8 U. S. C. 203; Sec. 7(c), Public Law 291, 79th Congress; Chapter 652, First Session; approved December 29, 1945); Sec. 15, Immigration Act of 1924 (43 Stat. 162; 8 U. S. C. 215); Secs. 110.27 and 110.29(a), Title 8, C. F. R.

<sup>32</sup>Same as note 31, except “merchant” is provided for under Sec. 3(6) of the Immigration Act of 1924 and the limitation as to purpose referring to “merchant” is included in subdivisions (b) and (c) of Sec. 110.29, Title 8, C. F. R.

<sup>33</sup>Sec. 3, Immigration Act of 1924 (43 Stat. 154; 8 U. S. C. 203); Sec. 4, same act, subdivisions (a) to (f), inclusive, (43 Stat. 155; 44 Stat. 812; 45 Stat. 109; 46 Stat. 854; 47 Stat. 656; 8 U. S. C. 204). See footnote 9 for specific statutory exception both as to time and purpose with respect to students admitted under Sec. 4(e) of the 1924 Act.

tion may be determined by the general rule used in establishing "residence" or "domicile" except as limited by the Naturalization Statutes.<sup>34</sup> Such rule is not, however, applicable in determining whether the commencement of the residence is unrestricted and not dependent upon the maintenance of a particular status within the contemplation of the Nationality Laws. It is settled that such residence cannot result from a mere sojourn in the United States, no matter how protracted.<sup>35</sup> Citizenship was cancelled following a long period of residence where the entry upon which naturalization was founded originated from an entry prior to the Immigration Act of 1924 as a stowaway.<sup>36</sup> Although "residence" or "domicile" may legally be established for many purposes, such as for divorce, charity, etc., by an alien admitted under the legal status of a temporary visitor, it is not sufficient for naturalization.<sup>37</sup> It is equally well settled that an alien cannot meet the legal resident status, requisite for naturalization, although lawfully admitted without time limitation prior to the Immigration Act of 1924 on the basis of his having been found not subject to deportation.<sup>38</sup> In discussing the legal effect of the certificate of arrival

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<sup>34</sup>*U. S. v. Silver*, 55 F. (2d) 250.

<sup>35</sup>*Kaplan v. Tod*, 267 U. S. 228, 45 S. Ct. 257, 69 L. Ed. 585; *Zartavian v. Billings*, 204 U. S. 170, 175, 27 S. Ct. 182, 184, 51 L. Ed. 428.

<sup>36</sup>*U. S. v. Parisi*, 24 Fed. Supp. 414.

<sup>37</sup>*In re Weig*, 30 F. (2d) 418; *U. S. v. Beda*, 118 F. (2d) 458; also as seamen, *U. S. v. Kreticos*, 40 F. (2d) 1020; *Fanfariotis v. U. S.*, 63 F. (2d) 352; *In re Jensen*, 11 F. (2d) 414; *In re Olson*, 18 F. (2d) 425.

<sup>38</sup>*Sadi v. U. S.*, 48 F. (2d) 1040; *Stapf v. Corsi*, 287 U. S. 129, 53 S. Ct. 40, 77 L. Ed. 215.

in the latter case the court stated that “\* \* \* proof of an essential fact is short. It did not show that he was *admitted for permanent residence*. That makes it impossible for him to prove what was necessary even before the Act of March 2, 1929 (45 Stat. 1512) took effect \* \* \*, and so we held that he could not be admitted to citizenship on his pending petition, since he could not show that he had in fact been admitted for permanent residence as the statute required \* \* \*. Proof of residence that may, perhaps, become permanent because this alien was not deportable \* \* \* is certainly not the same as proof of his *lawful entry for permanent residence*.” (Italics ours.) It is clear that the nature of the alien’s entry must be assessed in the light of the immigration laws.<sup>39</sup> Although regarded as a “permanent resident” of the Virgin Islands by reason of regulations under the immigration laws, an alien who could not establish his original entry by a certificate of arrival from the registry of the arrival of aliens in the Virgin Islands was held not to be entitled to naturalization. The court<sup>40</sup> pointed out that it was not until March 31, 1938 that the Solicitor of the Department of Labor ruled that both the Immigration Acts of 1917 and 1924 were applicable to the Virgin Islands and were enforceable by the Immigration and Naturalization Service. On July 1, 1938, under the above ruling, the Immigration and Naturalization Service assumed responsibility for the enforcement of the immigration laws in the Virgin Islands. Under a regulation promulgated by the Commissioner of

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<sup>39</sup>*Werblov v. U. S.*, 134 F. (2d) 791.

<sup>40</sup>*In re Sinmiolkjier*, 71 Fed. Supp. 553 (D. C.), Virgin Islands, 1947.

the Immigration and Naturalization Service, upon the re-entry of an alien, resident of the Islands prior to July 1, 1938, he was to be regarded as presumed to have been lawfully admitted for permanent residence even though no record of his original admission existed, and under the regulation was required to be recorded as a lawful resident alien returning from a temporary absence. The certificates of arrival in these cases were based upon records created under this regulation upon a reentry after July 1, 1938. Applying the general rule by which “residence” or “domicile” may be established clearly, these aliens were “resident” or “domiciled aliens” of the Virgin Islands and although they may remain there indefinitely they were held not to be eligible for naturalization because the starting point of their residence for naturalization purposes could not in fact be evidenced by a certificate of arrival made up from a registry showing their original admission to have been for lawful permanent residence within the meaning of the Nationality Act of 1940.<sup>41</sup>

The requirement that only a certification from the registry of entires of aliens certifying to the admission of the alien for lawful permanent residence will be a proper foundation for a petition for naturalization is a basic longstanding principle of the naturalization laws of this country.<sup>42</sup>

It clearly appears that the lower court in the instant case when stating that “the term ‘residence,’ as used in the naturalization statute, is practically synonymous with ‘domicile’,” confused that principle with the test used in

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<sup>41</sup>Secs. 328(a) and 329(a), Nationality Act of 1940, footnote 22.

<sup>42</sup>See footnote 18 for historical background.

determining whether or not there had been a break in the continuity of the statutory period of three years residence which must elapse immediately prior to the filing of petition for naturalization [R. 12]. That fact is further shown by the decisions cited as authority for the court's conclusion, all of which relate to the question of whether there has been a break in the continuity of the residential period, with one exception.<sup>43</sup> These cases do not deal with the question of whether the starting point of residence prerequisite to naturalization was evidenced by a certificate of arrival certifying that the registry showed a lawful admission for permanent residence. The certificate of arrival in the present case does not certify that appellee was admitted for lawful permanent residence, but rather it certifies only that according to the registry of his entry appellee was "*lawfully admitted to the United States of America as the son of a merchant under Section 3 (6) of the Immigration Act of 1924*" [R. 9]. (Italics ours). The lower court further states that "long before the Nationality Act of 1940, Chinese merchants admitted to engage in business here pursuant to the Treaty of 1880 were referred to as 'domiciled' in this country" [R. 12]. None of the cases cited by the court, however, involve a determination of whether "domicile" as there construed would meet the requirement of the Nationality Laws that the entry be evidenced by a certificate certifying to the lawful admission of the alien for permanent residence as a condition precedent to jurisdiction to grant citizenship. All of the cases cited by the court as indicating that merchants were regarded as "domiciled" in this country

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<sup>43</sup>*U. S. v. Parisi* 24 Fed. Supp. 414, 419.

came before the courts in writs of habeas corpus suits to determine whether the Immigration Service in deciding the excludability or deportability of each alien had observed the rules of due process in the administrative proceeding. In none of these cases was the question of construction of the terms "domicile" or "residence" in relation to the naturalization statutes before the court. The mere fact that the court found their residence not subject to any time limitation or that they were not deportable falls far short of holding that the starting point of their residence met the prerequisite of an entry of an alien upon which a certification from the registry of the record of arrival could be made that they were admitted for lawful permanent residence within the meaning of the naturalization laws. *Such a determination would be completely foreign to the legislative design.* It would result in the sanctioning of naturalization of aliens admitted as "accredited officials of a foreign government" under Section 3 (1) of the Immigration Act of 1924; also aliens admitted as a functionary of an international organization under Section (7) of the same act, as amended by the Act of December 29, 1945, Public Law 291, 79th Congress, First Session; or an alien admitted as a treaty trader under Section 3 (6) of the same statute, because in none of these three classes does the law set a time limitation. The period of their residence is unlimited *provided the particular status under which classified by the immigration statutes is maintained.*



**Admission After the Immigration Act of 1924 of the  
Minor Son of a Chinese Merchant, Admitted  
Prior to That Act, Does Not Constitute Lawful  
Permanent Residence for Naturalization Purposes.**

The court in the instant case reasons that “precedent of long standing” holds that where the merchant father was admitted prior to 1924 and the wife and minor children admitted after 1924 they “are entitled to be admitted for permanent residence by virtue of the treaty” [R. 11]. The question which the Supreme Court in the case of *Cheung Sum Sheè v. Nagle*<sup>44</sup> had to decide was whether the wives and minor children of Chinese merchants admitted under the Treaty prior to 1924 were guaranteed the right of entry by the Treaty of 1880 or whether they were mandatorily excluded from the United States under the provisions of the Act of 1924. Article II of the Treaty, although silent as to the family of a merchant, was held by necessary implication to include the wives and minor children.<sup>45</sup>

When enacting Section 3 (6) of the 1924 Act, in its original form, Congress must have been aware of the construction placed on the Treaty, yet it likewise made no mention of the wife and children of a merchant and by Section 13 (c) made excludable all persons racially ineligible to citizenship. The court found that the omission of the wives and children in Section 3 (6) of the 1924 Act in its original form failed to show any “Congressional intent absolutely to exclude” the wives and minor children of Chinese merchants. By Act of July 6, 1932, the sixth

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<sup>44</sup>268 U. S. 336, 45 S. Ct. 539, 69 L. Ed. 985.

<sup>45</sup>*U. S. v. Mrs. Gue Lim*, 176 U. S. 459, 20 S. Ct. 415, 44 L. Ed. 544.

subdivision of Section 3 of the 1924 Act was amended to provide for the entry of the wives and unmarried minor children of merchants as non-immigrants. The decision in the *Sheung Sum Shee v. Nagle* case, *supra*, fell far short of holding that the wives and minor children were entitled to admission under a status equivalent to that of an “immigrant” for lawful permanent residence upon which a petition for naturalization could be founded. Insofar as the 1924 Act related to the wives and minor children, the court in clear and unmistakable language held them not to be admitted as “immigrants,” but rather that they were classified as “non-immigrants.” Reference is made to the following words of the court (U. S. p. 540): “An alien entitled to enter the United States ‘solely to carry on trade’ under an existing treaty of commerce and navigation is *not an immigrant within the meaning of the Act, Section 3 (6)*, and therefore is not absolutely excluded by Section 13” (Italics ours), of the 1924 Immigration Act. Further, “In a very definite sense *they are specified by the Act itself as non-immigrants.*” (Italics ours.)

The 1924 Immigration Act by express provision applied to all aliens entering the United States after its effective date on July 1, 1924, even though admissible under some other law. It provided that “\* \* \* an alien, although admissible under the provisions of the immigration laws, other than this Act, shall not be admitted to the United States if he is excludable by any provision of this Act.”<sup>46</sup> Section 13(c) of the 1924 Act excluded from admission as “immigrants” all aliens ineligible to citizenship unless found to be admissible “\* \* \* as a nonquota immigrant

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<sup>46</sup>(43 Stat. 166; 8 U. S. C. 223). See footnote 6.

under the provisions of subdivision (b), (d), or (e) of Section 4, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) is not an immigrant as defined in Section 3.”<sup>47</sup>

Being of a race ineligible to citizenship, the wives and minor children were excludable under the 1924 Act if applying for admission as “immigrants” and could only be admitted under the status of a “nonquota immigrant” under Section 4 of the 1924 Act, or as “non-immigrants” under Section 3 of the same Act. The Supreme Court, therefore, concluded that such racially ineligible wives and minor children were excludable as “immigrants,” but that they were admissible under a derivative status as “non-immigrants” as provided in Section 3(6) of the 1924 Act.

This Honorable Court in *Haff v. Yung Poy*,<sup>48</sup> did not decide that the minor son in that case was admitted as an “immigrant” within the meaning of the 1924 Act for lawful permanent residence, such as would meet the requirement of the Nationality Act, nor that his derivative status entitled him to such a classification by reason of the Treaty. The merchant father was not made deportable under the laws enacted prior to 1924 to carry out the Treaty, on the grounds of having failed to maintain the status of merchant under which admitted. This court pointed out the many harsh consequences of requiring the deportation of the wives and minor children, and concluded only that the son was not to be deported because of the abandonment of mercantile status by his merchant father.

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<sup>47</sup>(43 Stat. 155; 8 U. S. C. 204). See footnote 9.

<sup>48</sup>*Haff v. Yung Poy*, 29 F. (2d) 999. Relied upon by the lower Court. [R. 12.]

## The Repeal of the Chinese Exclusion Acts Did Not Contemplate That Chinese in This Country Under a Mercantile Status Would Become Eligible for Naturalization.

In repealing the Chinese Exclusion Acts and making Chinese racially eligible for naturalization,<sup>49</sup> the Congressional Committees contemplated that such legislation would place those few Chinese that were to be permitted entry on a parity with other racial groups, but not that the legislation would, in any way, change the existing immigration status of Chinese aliens in this country so as to enable greater numbers to meet the requirements for naturalization. In fact, the language of the Senate Committee clearly demonstrates the Committee understood that the greater number of Chinese in this country are ineligible to naturalize because they have not been admitted “\* \* \* for lawful permanent residence, which is a condition precedent to naturalization.” (Italics added.) Their understanding was expressed in the following language:<sup>50</sup>

*“The number of Chinese who will actually be made eligible for naturalization under this Section is negligible. There are approximately 42,000 alien Chinese persons in the United States (37,242 in continental United States and 4,844 in Hawaii, according to the census figures of 1940). However, a large number of these Chinese have never been admitted to the United States for lawful permanent residence, which is a condition precedent to naturalization and, there-*

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<sup>49</sup>Chinese Exclusion Repeal Act of Dec. 17, 1943 (57 Stat. 600; Sec. 303); Natl. Act of 1940; Chap. 344, Sec. 3 (57 Stat. 601; 8 U. S. C. 703).

<sup>50</sup>78th Congress, First Session; Sen. Rep. 535, p. 6; House Rep. 732.

*fore, many of this number would not be eligible for naturalization, not because of racial disability, but because they cannot meet existing statutory requirements of law. The number of Chinese who will be made eligible in the future, in addition to those already here, will of necessity be very small because the quota for China is limited to 105 per annum, as provided for in Section 2 of this bill.”* (Italics added.)

Section 2 of the Chinese Exclusion Repeal Act of December 17, 1943, limits the number of Chinese who are made admissible under the law for permanent residence to certain aliens classified as “non-quota immigrants,”<sup>51</sup> and sets the number of Chinese admissible annually as “immigrants” to be computed under the provisions of Section 11 of the 1924 Act. Under that computation the quota for Chinese is limited to 105 Chinese annually.<sup>52</sup> The Chinese Exclusion Repeal Act also provides that a preference up to seventy-five per centum of this quota shall be given to Chinese born and resident in China. The remaining twenty-five per centum would be available for Chinese in other countries or temporarily in the United States who are in a position to apply for pre-examination,<sup>53</sup> or other benefits of the immigration laws incident to admission for lawful permanent residence in the United States as “immigrants.” Under the limitation of twenty-

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<sup>51</sup>Sec. 4(b)(d)(e) and (f) (43 Stat. 155; with amendments; 8 U. S. C. 204), except subdivision (e) of Sec. 4 is restricted in period of residence by Sec. 15, Act of 1924, as more fully set out in footnote 9.

<sup>52</sup>Sec. 61.316, Title 22, C. F. R. of U. S. A., provides “the following is a list of the annual immigration quotas established for the various quota countries of the world \* \* \* Chinese 105.”

<sup>53</sup>Part 142, Title 8, C. F. R.

five per cent of the quota available to Chinese who may be admitted to this country from countries other than China, which includes Chinese already in the United States, it follows that only very few of the Chinese already here can be naturalized, and carries out the legislative design and understanding that “*the number who will naturally be made eligible for naturalization is negligible.*” (Italics added.)

The Congressional Committee indicates very clearly that the purpose of the Chinese Exclusion Repeal Act was not to open wide the doors to Chinese “immigrants.”<sup>54</sup>

“The purpose of this section is to repeal all of the laws enacted between 1882 and 1913, dealing with the exclusion and deportation of Chinese persons. It should be stated at this point that no substantial gain accrues to the Chinese people through the repeal of these laws from a standpoint of permitting Chinese to enter the country who are at present denied that privilege because other provisions of laws subsequently enacted effectively keep out persons of the Chinese race as well as persons of other races ineligible to citizenship. *It does, however, eliminate the undesirable laws specifically designating Chinese as a race to be excluded from admission to the United States.*” (Italics added.)

President Roosevelt, in his message to Congress October 11, 1943, regarding the Chinese Exclusion Repeal Act, stated:<sup>55</sup>

“By the repeal of the Chinese exclusion laws, we can correct a historic mistake and silence the distorted

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<sup>54</sup>See footnotes 16 and 17.

<sup>55</sup>Sén. Rep. 535, p. 3, 78th Congress, First Session.

Japanese propaganda. The enactment of legislation now pending before the Congress would put Chinese immigrants on a parity with those from other countries. The Chinese quota, would, therefore, be only about 100 immigrants a year. There can be no reasonable apprehension that any such number of immigrants will cause unemployment or provide competition in the search for jobs. The extension of the privileges of citizenship to the relatively few Chinese residents in our country would operate as another meaningful display of friendship."

The foregoing quotations from the Congressional Committee reports are a public recognition that all the prior laws dealing with Chinese were laws of "exclusion" and not admission, designed for the purpose of preventing an influx of Chinese immigration into the United States, and that the privilege granted by Article II of the Treaty of 1880 to special classes named therein, including merchants, "to go and come of their own free will and accord" was a special privilege granted to a preferred class for commercial purposes only. The Treaty contained no definition of the term "merchant," nor did it provide any particular procedure for his coming and going. It was not until the Act of November 3, 1893, enacted in pursuance of the Treaty, that the term "merchant" was defined.<sup>56</sup> That definition requires that he maintain his mercantile activities in order to retain the status under that Act and the Treaty, of "merchant." By this definition he was required to engage in buying and selling merchandise, and to have a fixed place of business, and during the time he claimed

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<sup>56</sup>See footnote 4.

to be so engaged was not to perform any manual labor except such as was necessary in the conduct of his business as a merchant.

Section 2 of the same Act in defining a “domiciled merchant” signifies in clear language a Congressional intent that admission of a Chinese as a merchant under this law was not to constitute an admission for unrestricted, lawful, permanent residence such as would form the foundation for a petition for naturalization.<sup>57</sup> It was provided that:

“Where an application is made by a Chinaman for entering into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish by the testimony of two creditable witnesses, other than Chinese, the fact that he conducted such business, as hereinbefore defined, for at least one year before his departure from the United States, and that during such year he was not engaged in the performance of any manual labor excepting such as was necessary in the conduct of his business as such merchant, *and in default of such proof shall be refused landing.*” (Italics added.)

A study of the history of the treaties and the legislation effectuating the treaty stipulations dispels any contention that it was ever intended or contemplated that Chinese were to be admitted into the United States as permanent settlers to become a part of the body politic of this country.

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<sup>57</sup>(28 Stat. L. 7.)



At the outset, Congress prohibited the naturalization of any Chinese who might then be in the United States.<sup>58</sup> Moreover, by Article IV of a Convention Regulating Chinese Immigration concluded March 17, 1894, it was provided that:

“In pursuance of Article III of the Immigration Treaty \* \* \* signed \* \* \* the 17th day of November, 1880 \* \* \* it is hereby understood and agreed that Chinese laborers or Chinese of any other class, either permanently or temporarily residing in the United States, shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation, *excepting the right to become naturalized citizens.* \* \* \*” (Italics added.)

All Chinese other than the specified exempt classes were excluded from admission, and if found in the United States were made deportable,<sup>59</sup> unless such Chinese had complied with the law requiring registration of all Chinese laborers within the United States during the registration period.<sup>60</sup> The character of the immigration status with which a merchant was clothed who had been admitted to the United States prior to the Immigration Act of 1924, is shown in a decision of the Supreme Court, involving the admissi-

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<sup>58</sup>Act approved May 6, 1882, providing, “That hereafter no State court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed.” (22 Stat. 61; 8 U. S. C. 363.)

<sup>59</sup>Sec. 13, Act of Sept. 13, 1880 (25 Stat. 476, 477); Sec. 2, Act of May 5, 1892 (27 Stat. 25); Sec. 3, Act of Mar. 3, 1901 (31 Stat. 1093).

<sup>60</sup>Act of May 5, 1892, as amended by the Act of Nov. 3, 1893 (28 Stat. 7).

bility of the wife and minor children upon their arrival at a port in the United States in 1917. The mercantile status under which the husband-father was admitted to the United States in 1901 had terminated and he was found to be a laundryman at the time of their application. The court concluded that the husband-father although himself admitted under a mercantile status, no longer had an immigration status entitling his wife and minor children to admission to the United States.<sup>61</sup> Although a Chinese admitted as a merchant prior to 1924 was held not to be subject to deportation because of subsequent abandonment of status, if he left the United States temporarily it was necessary for him to establish a mercantile status each time he reentered the United States. He was not, however, limited in the establishing of such mercantile status to presentation of a section six certificate issued by his own government attesting to his mercantile status in the same manner as on original entry.<sup>62</sup>

From the foregoing judicial interpretations and reference to the history of the treaties and legislation preceding the enactment of the 1924 Immigration Act, it is readily understandable that the Supreme Court would hold that the admission of the wives and minor children after the 1924 Act, under the existing status of a Chinese admitted as a merchant prior to the said Act, was not as "immi-

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<sup>61</sup>*Yee Won v. White*, 256 U. S. 399, 41 S. Ct. 504, 65 L. Ed. 1012; *Chung Yim v. U. S.*, 78 F. (2d) 43.

<sup>62</sup>*Lau Ow Bew v. U. S.*, 144 U. S. 47, 12 S. Ct. 517, 36 L. Ed. 340; *U. S. v. Wong You*, 223 U. S. 67, 32 S. Ct. 195, 56 L. Ed. 354. Mr. Justice Holmes, in referring to the Exclusion Acts, states: "The existence of the earlier laws only indicates the special solicitude of the government to limit the entrance of Chinese."

grants” or “nonquota immigrants” as those terms are used in the 1924 Act which terms define the only classes of aliens admitted for lawful unrestricted permanent residence, but rather found their admissions to be authorized as “non-immigrants,” the term used in the 1924 Act to cover all classes of aliens whose admissions are for a period of time to be determined upon a continuous maintenance of status or a period specified at time of admission, but not for lawful unrestricted permanent residence as to time or purpose.

All aliens, including Chinese who did not have an unrestricted permanent immigration status, and who entered the United States prior to the 1924 Act and who were not deportable under that Act, may have their entries or residence legalized, and a registry made of their entries when so created meets the requirement of the Nationality Act of 1940. A certification from such a registry of the alien’s entry showing admission for lawful permanent residence meets that essential prerequisite to a grant of citizenship. The Nationality Act provides:<sup>63</sup>

“(c) For the purpose of the immigration laws *and the naturalization laws* an alien, in respect of whom a record of registry has been made as authorized by this section, *shall be deemed to have been lawfully admitted to the United States for permanent residence as of the date of such alien’s entry.*” (Italics added.)

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<sup>63</sup>Secs. 328 (b) and (c), Nationality Act of 1940 (54 Stat. 1151-1152; 8 U. S. C. 728).

### Conclusion.

The order naturalizing the appellee was erroneously granted. Since appellee failed to establish his admission for lawful permanent residence as required by the Naturalization laws, he was not eligible for citizenship.

It is respectfully submitted, therefore, that the judgment and order of the District Court, admitting him to citizenship, should be reversed.

Respectfully submitted,

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on the Brief.*

No. 11668

IN THE

United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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WILLIAM A. CARMICHAEL, District Director, Immigration  
and Naturalization Service, United States Department  
of Justice, District No. 16,

*Appellant,*

*vs.*

WONG CHOON HOI,

*Appellee.*

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BRIEF FOR APPELLEE.

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FILED

OCT 10 1947

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No. 11668

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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WILLIAM A. CARMICHAEL, District Director, Immigration  
and Naturalization Service, United States Department  
of Justice, District No. 16,

*Appellant,*

*vs.*

WONG CHOON HOI,

*Appellee.*

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## BRIEF FOR APPELLEE.

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### Statement of the Case.

Appellee filed his petition to become a citizen in the District Court of the United States for the Southern District of California, Central Division, on September 4, 1945. [R. 2-7.] Said petition was filed in the form and manner provided by law [R. 2-8] and attached thereto was the Certificate of Arrival provided by the Commissioner of Immigration and Naturalization stating the date, place and manner of petitioner's arrival in the United States. (54 Stat. 1156; 8 U. S. C. 732.) [R. 9.] The Immigration and Naturalization Service filed with the said court a recommendation that the petition be denied for the reasons: "(1) There was not filed with the peti-

tion a valid certificate showing the date, place and manner of the petitioner's arrival in the United States, and (2) the petitioner has failed to establish continuous legal residence in the United States for the period required by law." [R. 14.] The petition was heard in open court on March 4, 1947, and was granted over the objection as entered. The Judge prepared and filed a written decision in the case. [R. 10-13.] The petitioner subscribed to and took the oath of allegiance to the United States of America. [R. 8.]

### Summary of the Facts.

Wong Choon Hoi, appellee herein, a person of Chinese race, was born in China, July 7, 1914. [R. 2.] His father, Wong Yung Sau, was lawfully admitted to the United States for permanent residence in 1922 as a Chinese merchant pursuant to Article II of the Treaty of 1880 between the United States and China. [R. 10.] Appellee was lawfully admitted to the United States, November 24, 1934, as the minor son of a resident Chinese merchant pursuant to Article II of the said same treaty. Both appellee and his father have resided continuously in the United States since the dates of their respective entries. On October 5, 1941, appellee married a born citizen of the United States. He has resided with his wife and family at Los Angeles, California, continuously since his marriage and is engaged in business as a merchant.

### Question Raised on Appeal.

There is only one question raised and to be considered on this appeal, namely:

Was the appellee lawfully admitted to the United States for permanent residence on November 24, 1934?

### Argument.

Was the appellee lawfully admitted to the United States, November 24, 1934, for permanent residence? The trial court so held and if, on appeal, this question can again be answered in the affirmative the judgment of the lower court must be sustained.

It must first be noted that the appellee is a person of the Chinese race and until the repeal of the so-called Chinese Exclusion Acts on December 17, 1943, was racially ineligible to citizenship in the United States and was even excluded from entering the United States except under provisions of certain treaties existing between the United States and China.

Immigration of Chinese persons to the United States including the appellee herein was controlled by the Treaty of November 17, 1880 (22 Stat. 826), and not by the Immigration Act of June 2, 1924 (8 U. S. C. 224). Article II of the said treaty provides:

“Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants . . . shall be allowed to go and come of their own free will and accord and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nations.”

The Government admits that the father, Wong Yung Sau, was admitted for permanent residence under this provision of the treaty on December 10, 1922, but contends that in some way the Immigration Act of 1924 abrogated the treaty and that the son was admitted under terms of the Act.

We contend that the treaty between the United States and China above referred to, was not modified or abrogated by any of the various acts of Congress, either expressly or by implication, until the Act of December 17, 1943, which repealed the Chinese Exclusion Act and made Chinese of a race eligible for United States citizenship, and that appellee was lawfully admitted to the United States for permanent residence November 24, 1934, under terms of the said treaty of 1880 between the United States and China.

The basic question has been settled by the Courts in a series of cases which we now discuss:

In *U. S. v. Mrs. Gue Lim* (176 U. S. 459) it was contended by the Government that the Congressional Act of 1884, relating to the necessity of Chinese persons obtaining certain certificates of identity, abrogated the terms of the Treaty of 1880 with reference to Chinese merchants, in that the certificate required by the terms of the Act could not be obtained by the wife and minor children of the merchant and consequently they could not enter the United States. The Court in considering the question quoted with approval the words of Mr. Justice Harlan delivered in *Chew Heong v. U. S.*, 112 U. S. 536, as follows:

“The Court should be slow to assume that Congress intended to violate the stipulation of a treaty so recently made with a government of another country. \* \* \* Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the Court cannot be unmindful of the fact that the honor of the Government and the people of the United States is involved in every inquiry whether rights secured

by such stipulations shall be recognized and protected. And, it would be wanting in proper respect for the intelligence and patriotism of a coordinate department of the Government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted.”

At page 465, the opinion goes on to say:

“We ought, therefore, to so consider the Act, if it can reasonably be done, as to further the execution and not to violate the provisions of the Treaty.”

The Court held that the Act of Congress did not abrogate the treaty but must be interpreted as carrying the terms of the treaty into effect.

The question as to the status of Chinese merchants, their wives and minor children who are admitted to the United States under terms of the Treaty of 1880 and the effect of the Immigration Act of 1924 was considered by the Supreme Court of the United States in *Cheung Sum Shee v. Nagle*, 268 U. S. 336, wherein the Act of 1924 was construed so as to preserve the treaty rights of 1880.

In this case the question was whether or not the wife and minor children of a resident Chinese merchant were still admissible to the United States under the terms of the Treaty of 1880 or whether these rights had been lost with the passage of the Immigration Act of 1924. In other words, did the Immigration Act of 1924 abrogate the Treaty of 1880? The Court held that it did not. At page 345 the opinion states:

“The wives and minor children of resident Chinese merchants were guaranteed the right of entry by the Treaty of 1880 and certainly possessed it prior to July 1, 1924, when the present Immigration Act

became effective. (U. S. v. Mrs. Gue Lim, 176 U. S. 459.) That Act must be construed with the view to preserve Treaty rights unless clearly annulled, and we cannot conclude that, considering its history, the general terms therein disclose a congressional intent absolutely to exclude the petitioner from entry.

“In a certain sense it is true that petitioners did not come ‘solely to carry on trade.’ But Mrs. Gue Lim did not come as a ‘merchant.’ She was nevertheless allowed to enter, upon the theory that a treaty provision admitting merchants by necessary implication extended to their wives and minor children. The rule was not unknown to Congress when considering the Act now before us, nor do we think the language of Sec. 5 is sufficient to defeat the rights which petitioner has under the treaty. In a very definite sense, they are specified by the Act itself as ‘non-immigrant.’ They are aliens entitled to enter in pursuance of a treaty as interpreted and applied by the Court 25 years ago.”

The foregoing decision is applied to consideration of Sec. 5 of the Immigration Act of 1924. The Government in the instant case contends that appellee was admitted under Sec. 3 of the same Act. It must be noted that Sec. 13(c) of the same Act specifically prohibits the admission of appellee as an “alien ineligible to citizenship” and the only law available to him at the time of his entry was the Treaty of 1880. The reasoning advanced by the Supreme Court in *Cheung Sum Shee v. Nagle* (268 U. S. 336), applies equally to Sec. 3 of the Immigration Act of 1924. The Act did not modify or abrogate the treaty in any respect and the appellee was lawfully admitted under the terms of said treaty for permanent residence in the United States.

The Admission of the Minor Child of a Resident Chinese Merchant Under Terms of the Treaty of 1880 Is an Admission for Permanent Residence.

This question is well reasoned and decided in *Haff v. Yung Poy*, 68 F. (2d) 203. (C. C. A., 9th Cir., 1933.) In that case the appellee was a native born Chinese boy legally admitted to the United States as the minor son of a resident Chinese merchant on June 2, 1926, at the age of nine (9). His father was, at the time of admission, lawfully domiciled in the United States and engaged as a merchant at San Jose, California. In 1927 the father ceased to be a merchant and obtained employment as a janitor, and the mercantile institution with which the father had been associated went out of business. Deportation proceedings were instituted against the minor son contending, (1) that the appellee's rights to remain permanently in the United States were measured by the Immigration Act of 1924 and not by the Treaty of November 17, 1880, and, (2) that one admitted to the United States under the Immigration Act of 1924 as the minor son of a trader became subject to deportation if the father ceased to carry on trade.

The Court held that the Act of 1924 did not abrogate the Treaty of 1880, for the reason that "no provision of the Act is in direct conflict with the treaty rights of such merchants."

After reviewing the decisions, including the ones herein above discussed (*Cheung Sum Shee v. Nagle*, 268 U. S. 336, 45 S. Ct. 539, and *U. S. v. Mrs. Gue Lim*, 176 U. S. 459, 20 S. Ct. 415), the Court states (page 204):

"In view of these decisions, we are of the opinion that appellee's right to remain in the United States

is measured by the Treaty and not by the Immigration Act of 1924, even though he came here after the passage of that Act.”

The Court then passed to the question: “Did the change in the father’s status require that the son be deported?” If the son was subject to the Act of 1924 and admitted thereunder on a temporary or terminable basis, he must now be deported. If admitted pursuant to the Treaty of 1880 the admission was for permanent residence and the boy was not deportable. The real question then for consideration must be worded thus: “Was the entry of the minor son, as the son of a Chinese merchant, on June 2, 1926, after the effective date of the Immigration Act of 1924, a lawful entry for permanent residence?” The Court held that the minor son’s right to remain in the United States was governed by the Treaty of 1880 and not by the Act of 1924 and that no limitation or restriction upon the alien’s stay in the United States is contained in the Treaty. At pages 204-205 the Court says:

“In support of its claimed right to deport appellee because he has lost his communicated status as the son of a merchant, the Government relies upon Section 15 of the Act of 1924 (8 U. S. C. A. 215) and the departmental rules promulgated thereon. Said Section 15 provides, in part, that, upon failure to maintain the status under which admitted, the alien will depart. But, as we have seen, appellee’s right to remain in the United States is governed by the treaty and not by the act, and no limitation or restriction upon the alien’s stay in the United States is contained in the treaty. On the contrary, it is well settled that a Chinese merchant, lawfully admitted prior to the Act of 1924, may remain here after he has lost his



status as a merchant (See *Lo Hop v. U. S.* (C. C. A. 6), 257 F. 489, and *Wong Sun Fay v. U. S.* (C. C. A. 9), 13 F. (2d) 67); and the government therefore concedes that appellee's father is not now deportable. The right of such a merchant's wife or minor child to remain here after loss of his or her communicated status, by reason of the merchant's changed occupation, is, of course, another question; but that such an alien's right is co-extensive with the right of the husband, or father, seems a just and reasonable answer, for the absurdities and hardships of a contrary rule of law are apparent. Thus, if a merchant, because of illness, mishap, economic condition, or other misfortune, were required to change his status as a merchant and secure other employment, should his hapless—and perhaps helpless—family be deported and he allowed to remain, or perforce required to remain because of long absence from his native country and environment? Likewise must the family of such a merchant be deported because, upon the death of the merchant, the communicated status of the wife and children has been lost?

With these harsh consequences in mind, and in view of the well-settled rule of law 'that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.' (*Lau Ow Bew v. U. S.*, 144 U. S. 47, 59, 12 S. Ct. 517, 520, 36 L. Ed. 340), we cannot conclude that the rights of such aliens to remain here should be construed so narrowly as the government contends, or that it was the intention of Congress in enacting the Immigration Act of 1924 that aliens admitted to the United States by virtue of the 'merchant status' of their prior domiciled father or husband, as the

case might be, should be deported because the merchant, although not subject to deportation, has lost his status as a merchant.”

The *Haff v. Yung Poy* (*supra*) case is exactly in point with the case here under consideration. The father in each case was admitted as a treaty trade merchant prior to the Immigration Act of 1924 and the minor son in each case was admitted as the minor son of the respective merchant after the effective date of the Act of 1924. The Court held that *Yung Poy* legally entered the United States for permanent residence pursuant to the Treaty of 1880 and was not subject to deportation. By the same reasoning Wong Choon Hoi, appellee herein, legally entered the United States for permanent residence pursuant to the Treaty of 1880 and is eligible to naturalization on such record.

### **The Cases Cited by Appellant Are Not in Point.**

Appellant argues the effect of a qualified admission to the United States under provisions of the Act of July 1, 1924, and we have no quarrel with the conclusions reached and the cases cited. He does, however, entirely disregard the fact that the appellee herein was admitted pursuant to the Treaty of 1880, and that his admission carried “no restrictions as to occupation, profession or limitation of time” [R. 21].

The cases cited by appellant wherein the question of entry into the United States is discussed are not in point. Not a single one of these cases involves an admission pursuant to the Treaty of 1880 and consequently are not helpful in considering the instant question.

In *Kaplan v. Tod* (267 U. S. 226, 45 S. Ct. 257, 69 L. Ed. 585), the subject was of feeble mind and was detained at Ellis Island when she applied for admission. She was later paroled to an institution and, by the institution, permitted to reside in the City of New York with her father. The Court held the subject had never legally entered the United States for residence even though for some period of time she had been physically in the United States.

In *Zartavian v. Billings*, 204 U. S. 170, 27 S. Ct. 182, 51 L. Ed. 428, the minor daughter of a naturalized citizen was denied admittance to the United States. She claimed to be a citizen of the United States through the naturalization of her father and the further fact that she was actually in the United States as a minor. The Court held that having been debarred from entry she was never lawfully in the United States.

In *U. S. v. Parisi*, 24 Fed. Supp. 414, the subject entered as a stowaway and attempted to use such entry as a basis for legal residence in the United States. The Court rightly held that he had no basis for legal residence.

In *In re Weig*, 30 F. (2d) 418, the subject entered as a visitor on a six month permit. The Court held this not to be a lawful entry for permanent residence.

In *U. S. v. Beda*, 118 F. (2d) 458, the subject obtained his naturalization, alleging five years' continuance residence in the United States immediately preceding the filing of his petition. In a cancellation action the Court found that he had actually been away from the United States more than two years out of the five and had returned to the United States as a non-immigrant on a temporary visit.

In *U. S. v. Kreticos*, 40 F. (2d) 1020, the subject arrived as a deserting seaman and manifestly was not admitted for permanent residence.

In *Fanfariotis v. U. S.*, 63 F. (2d) 352, the subject entered as a seaman and the Court rightly held that he was not admitted for permanent residence.

In *In re Jensen*, 11 F. (2d) 414, the subject also entered as a deserting seaman and of course was not lawfully admitted for permanent residence.

In *In re Olsen*, 18 F. (2d) 425, the subject obtained a declaration of intention while on a trip to the United States and then entered and paid head tax at a later date. The Court held the declaration to be invalid since it was obtained before he had any status as a resident in the United States.

In *Sadi v. U. S.*, 48 F. (2d) 1040, the subject entered as a student for a period of two years. Of course, he was not admitted for permanent residence.

In *Stapf v. Corsi*, 287 U. S. 129, 53 S. Ct. 40, 77 L. Ed. 215, the subject entered as a deserting seaman in 1923 and was thereafter permitted to return to the United States after a visit abroad upon his representation that he was a previously lawfully admitted immigrant. The Court rightly held that he had not been lawfully admitted for permanent residence in 1923.

It will be noted that all of the cited cases simply hold that an alien must be admitted for permanent residence as a condition precedent to applying for naturalization. We thoroughly agree with that statement of the law and we submit that the appellee herein was lawfully admitted for permanent residence on November 24, 1934.

## **The Appellant Takes an Inconsistent View.**

The question of the status of Chinese persons admitted to the United States as minor sons of merchants prior to July 1, 1924, has been considered by the government in many cases, where, since the repeal of the Chinese Exclusion Act, these persons have applied for admission to citizenship with a Certificate of Arrival based upon said entry. In these cases the Immigration and Naturalization Service has ruled that where the subject arrived prior to July 1, 1924, the entry is for lawful, permanent residence and is sufficient in law for naturalization purposes.

Where is the authority in law to take a different view concerning an identical entry after July 1, 1924, and before December 17, 1943? All such Chinese persons have been admitted under authority of the same law; the Treaty of 1880, and all are lawfully admitted for permanent residence.

## **Admission of the Minor Son of a Chinese Merchant After July 1, 1924 Is on Exactly the Same Basis as a Similar Admission Prior to That Date.**

We have heretofore pointed out that there is no difference in law as to the resident status of the minor son of a Chinese merchant admitted at any time prior to December 17, 1943. We have also shown that the Immigration and Naturalization Service admits that the said sons admitted prior to July 1, 1924, are lawfully in the United States for permanent residence and eligible to be naturalized upon the basis of such entry record.

In an attempt to distinguish the case of *Cheung Sum Shee v. Nagle* (*supra*) and *Haff v. Yung Poy* (*supra*), Appellant fails to recognize that at the time said cases

were considered and, in fact, until December 17, 1943, persons of the Chinese race were not eligible to be naturalized. Naturally neither case touches upon the subject of residence for naturalization purposes. The *Shee* case is authority for the proposition that the Immigration Act of 1924 did not modify, abrogate, or in any respect affect the Treaty of 1880. The *Haff v. Yung Poy* case is authority for the proposition that the admission of a Chinese to the United States as the minor son of a resident Chinese merchant is an admission pursuant to the Treaty of 1880, and although admitted after July 1, 1924, the admission is for permanent residence.

**Congress Granted the Privilege of Naturalization to  
All Chinese Aliens Lawfully Admitted to the  
United States for Permanent Residence.**

Appellant argues that Congress in repealing the Chinese Exclusion Act and making persons of Chinese race eligible to naturalization did not contemplate that those admitted as the sons of merchants prior to December 17, 1943, would become citizens. The Senate Committee reports are cited as evidence wherein it is stated that a large number of the then 37,242 alien Chinese in continental United States have never been admitted for lawful permanent residence, and therefore many of this number would not be eligible for naturalization. Undoubtedly the statement and the conclusion are both true, and while we find no statistics showing the exact number of persons in the 37,242 who were admitted as sons of merchants, acquaintance with any group of resident Chinese indicates that the percentage is relatively small. Furthermore, the Hon. Edward J. Shaughnessy, in his article published in the U. S. Department of Justice, Immigration and Naturalization Service, Monthly Review, Vol. I, No. 7, April

1944, gives the real reason for the small number of alien Chinese in the group who would seek naturalization, when at page 6, he states:

“The Chinese is an old population group; the median age for non-citizen Chinese males is 50.29—in 1940 the median age for the male population of the United States as a whole was 29.1. Undoubtedly, many of the older Chinese will not be able to satisfy the naturalization courts’ so-called ‘educational requirements’ and will, because of their age, never be able to.”

The entire alien Chinese population, as shown above, amounted to less than 1% of our total alien population at that time, and to a relatively smaller percentage when compared with our 130 odd millions. It is readily understood that the Senate Committee, knowing the small number of Chinese in the United States and the median age and customs pertaining to the group would state: “The number of Chinese who will actually be made eligible for naturaliaztion under this Section is negligible.”

The Congress certainly intended to open the privilege of naturalization to all those who could meet the requirements of the law, which appellee herein has fully done.

### **Conclusion.**

The trial court properly found that appellee had been lawfully admitted to the United States for permanent residence, and was therefore eligible to naturalization. The judgment and the order of the Court admitting him to citizenship should be sustained.

Respectfully submitted,

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*Attorney for Appellee.*





No. 11668.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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WILLIAM A. CARMICHAEL, District Director, Immigration and Naturalization Service, United States Department of Justice, District No. 16,

*Appellant,*

*vs.*

WONG CHOON HOI,

*Appellee.*

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## APPELLANT'S REPLY BRIEF.

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WILLIAM A. CARMICHAEL, District Director, Immigration and Naturalization Service, United States Department of Justice, District No. 16,

*Appellant,*

*vs.*

WONG CHOON HOI,

*Appellee.*

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## APPELLANT'S REPLY BRIEF.

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### Chinese Merchants Classified as "Non-Immigrants" Under the 1924 Immigration Act.

Appellee's argument is primarily centered on the proposition that it is undisputed that appellee's father was admitted for "lawful permanent residence" under the treaty and that the communicated status of appellee, although his admission occurred after the 1924 Immigration Act, is of equal legal standing. (Br. p. 3.)<sup>1</sup>

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<sup>1</sup>The abbreviation "Br." when used herein refers to Appellee's Brief.

The authorities do not support this contention. (App. Br. pp. 28, 29, 34, 35, 36, 37.)<sup>2</sup>

It is true that the Supreme Court<sup>3</sup> held that the Chinese wives and minor children of merchants admitted prior to 1924 were “\* \* \* entitled to enter in pursuance of a treaty \* \* \*” and were not excluded by the 1924 Immigration Act for the reason that the immigration status of “merchant” as it existed prior to 1924 was under the Immigration Act of 1924, classifiable as “non-immigrant.” This was a clear recognition by the Supreme Court that Chinese merchants admitted prior to the 1924 Immigration Act were regarded as holding an immigration status equivalent to the immigration status of “non-immigrant.” The 1924 Immigration Act classified those aliens who were to be admissible for lawful permanent unrestricted residence as “immigrants” and “non-quota immigrants.” The Supreme Court held that<sup>4</sup> “*an alien entitled to enter the United States ‘solely to carry on trade’ under an existing treaty of commerce and navigation is not an immigrant within the meaning of the Act, Section 3 (6), and therefore is not absolutely excluded by Section 13. \* \* \* in a very definite sense they are specified by the act itself as ‘non-immigrants.’*” (Emphasis added.)

Appellee erroneously concludes (Br. p. 10) that this Court<sup>5</sup> held that Yung Poy had “\* \* \* legally entered

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<sup>2</sup>The abbreviation “App. Br.” when used herein refers to Appellant’s Brief.

<sup>3</sup>*Cheung Sum Shee v. Nagle*, 268 U. S. 336, 45 S. Ct. 539, 69 L. Ed. 985.

<sup>4</sup>*Cheung Sum Shee v. Nagle*, U. S. p. 540.

<sup>5</sup>*Haff v. Yung Poy* (9th Cir.), 68 F. (2d) 203. The maintenance of the status of “merchant” provision of the 1917 Immigration Act, held not applicable to Chinese merchants, *Wong Sun Fay v. U. S.* (9th Cir.), 13 F. (2d) 67, 68.



the United States for permanent residence pursuant to the treaty.” The question of whether or not Yung Poy was possessed of an immigration status equivalent to “lawful permanent residence” was not before this Court. This Court found that the status of “merchant” or “son of merchant” had been lost. The Supreme Court decision in the case of *Cheung Sum Shee v. Nagle, supra*, classifying “merchant” as a non-immigrant was cited by this Court. Yung Poy’s right of admission was found to stem from that of his father who had entered the United States prior to 1924 and that since there was no provision making it a deportable offense under the prior acts of Congress for failure to maintain the status of merchant, this Court would not require the deportation of Yung Poy by reason of any of the provisions of the 1924 Act.

An alien may be lawfully admitted to the United States and remain here unlawfully.<sup>6</sup> The mere fact that the acts of Congress prior to the 1924 Act did not make it unlawful for a Chinese who had abandoned his mercantile status to remain in this country did not by implication clothe such Chinese with the immigration status of a “lawful permanent resident.” Such Chinese was not made deportable under any of the prior laws for failure to maintain his mercantile status. Upon abandonment or loss of mercantile status such a Chinese was not held to acquire any other immigration status. The denial to a right of admission as the wife and minor children of a merchant was sustained by the Supreme Court where the Chinese husband-father after admission as a merchant,

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<sup>6</sup>*Chung Yim v. U. S.* (8th Cir.), 78 F. (2d) 43, 46.

abandoned his mercantile status and became a laundryman.<sup>7</sup>

It is incontrovertibly established by the foregoing authorities that the immigration status of a Chinese merchant prior to 1924 was limited as to “purpose,” and that such merchant never possessed an immigration status of greater legal efficacy than “non-immigrant” as that term is defined in the 1924 Immigration Act. Whether the admission occurred before or after the 1924 Immigration Act, Chinese merchants were not classed as permanent residents, but were admitted as a preferred class for commercial purposes, despite the exclusion of Chinese aliens, “to go and come of their own free will and accord.” In the Immigration Act of 1924, Congress deliberately excluded treaty merchants from its designation of “immigrants”—those aliens coming for permanent settlement—and classified them with the “non-immigrants”—whose admission to the United States was limited as to “period of time” or “purpose.”

### **Modification of the Treaty by the Amendment of July 6, 1932 to the Immigration Act of 1924.**

Appellee (Br. p. 4) contends that the treaty with China was not modified or abrogated by any of the acts of Congress, either expressly or by implication, until the passage of the Act of December 7, 1943, repealing the Chinese Exclusion Acts. This contention is untenable. The Supreme Court has not had before it for construction the effect on the treaty of the amendment to the Immigration Act of 1924 by the Act of July 6, 1932.<sup>8</sup> Appellee was

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<sup>7</sup>*Yee Won v. White*, 256 U. S. 399, 41 S. Ct. 504, 65 L. Ed. 1012; App. Br. p. 35, 36.

<sup>8</sup>Act of July 6, 1932 (47 Stat. 607; 8 U. S. C. 203).

admitted to the United States after the effective date of this amendment. (App. Br. p. 18, footnote 25.) The legislators very definitely had in mind the treaty in passing this amendment. To a certain extent, however, it appears that the amendment was for the purpose of codification of existing law as it had been interpreted by the Supreme Court. That design clearly appears stated in the Congressional Committee report on this legislation:<sup>9</sup>

“The provisions of the section referred to (Sec. 3 (6) of the 1924 Act) have also been interpreted as applicable to the wives and minor children of treaty aliens, in line with the holding of the Supreme Court in *Cheung Sum Shee v. Nagle* (268 U. S. 336).”

The 1932 amendment made it necessary for a Chinese in order to qualify as a merchant to show that he was engaged in international trade between the United States and the country of which he was a citizen. It further limited admission of the children of a Chinese merchant to the *unmarried children under 21*.<sup>10</sup> Since this amendment in express terms does restrict the treaty, it would appear that the son, whose Chinese merchant father was admitted prior to 1924, was not entitled to admission solely on the basis of the treaty after the amendment supplying the statutory modification to the treaty found lacking under the decision in the case of *Cheung Sum Shee v. Nagle, supra*.

The question of whether a minor child who first applies for admission after the 1932 amendment as the son of a Chinese merchant admitted prior to 1924, would

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<sup>9</sup>House Rep. 431, 72d Congress, 1st Sess. See also 75th Cong. Rec. 13840.

<sup>10</sup>App. Br. pp. 8, 9, footnotes 7, 8, and p. 18, footnotes 25, 26.

be entitled to admission if his merchant father were not engaged in international trade is not found to have been decided by the courts. The 1932 amendment is found to be construed not to require a merchant who entered prior to the amendment, and who temporarily visited in Canada for a few months, to establish upon his return that he was engaged in international trade.<sup>11</sup> In deciding that the Supreme Court held, in effect, in the *Cheung Sum Shee v. Nagle* decision, *supra*, that the treaty rights of Chinese merchants had not been affected by the Act of 1924, in a later decision the Court stated, “\* \* \* I believe the treaty and the statute were construed together in that case, and that the Supreme Court did not intend to hold that the treaty rights of Chinese merchants had not been in any way affected by the Act of 1924.”<sup>12</sup> A regulation of the State Department requiring that a merchant be engaged in international trade was construed as being unauthorized under a similar provision of a treaty with Japan.<sup>13</sup> This regulation, however, was promulgated prior to the 1932 amendment to the Immigration Act of 1924. In a decision involving the provision in the treaty with China relative to teachers, this Court<sup>14</sup> points out that “The Act of 1924, to some extent, circumscribes and limits the rights of students to be admitted, and limits the rights of teachers to professors of colleges \* \* \*,” and held that the rights of admission of a Chinese under the status of teacher was controlled and limited by the 1924 Immigration Act, and pointed out that Chinese mer-

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<sup>11</sup>*Kaname Susuki v. Harris*, 29 F. Supp. 46.

<sup>12</sup>*U. S. v. Hughes*, 9 F. Supp. 792, 796.

<sup>13</sup>*Shizuko Kumanomido v. Nagle* (9th Cir.), 40 F. (2d) 42, 46.

<sup>14</sup>*Jeu Jo Wan v. Nagle* (9th Cir.), 9 F. (2d) 309, 310.

chants and their families were not excluded by the 1924 Act because no provision of that Act was in direct conflict with the treaty rights of such classes. This decision takes cognizance of the provisions of Sections 25 and 28(g) of the 1924 Act<sup>15</sup> which reflects a congressional intent to abrogate all laws, conventions and "treaties" relating to immigration, exclusion or expulsion of aliens inconsistent therewith. Article 4 of the treaty with China expressly provides for further legislation to regulate the admission of exempt Chinese and to minimize the opportunities for evasion of the exclusion laws.<sup>16</sup> The 1932 amendment to the 1924 Act does "circumscribe and limit" the treaty in question. This being so, it follows that Section 15 of the 1924 Act<sup>17</sup> and regulations thereunder,<sup>18</sup> requiring the maintenance of exempt status of aliens admitted after 1924 as non-immigrants, would be applicable to appellee even though his merchant father was admitted prior to 1924. The 1932 amendment applies to all nationals of foreign countries entering the United States under similar treaties of commerce and navigation. Any of the treaties containing provisions inconsistent with the 1924 Act and specifically provisions inconsistent with the 1932 amendment relating to merchants were abrogated as contemplated by Sections 25 and 28(g) of the 1924 Act. The decision in *Cheung Sum Shee v. Nagle*<sup>19</sup> decided only the narrow question of whether the omission in Section

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<sup>15</sup>Secs. 25 and 28(g), Act of 1924 (43 Stat. 166; 8 U. S. C. 223, and 43 Stat. 168-169; 8 U. S. C. 224).

<sup>16</sup>*U. S. ex rel. Lam Shin Hing v. Corsi*, 4 F. Supp. 591, 593.

<sup>17</sup>Section 15, Act of 1924; 8 U. S. C. 215.

<sup>18</sup>App. Br. pp. 10, 11, 12, 21, footnotes 11, 12, 32.

<sup>19</sup>*Cheung Sum Shee v. Nagle*, 268 U. S. 336, 45 S. Ct. 539, 69 L. Ed. 985.

3 (6) to mention the wives and children of merchants and the use of the words “solely to carry on trade” and the language contained in Sections 13(c) and 5 of the 1924 Act showed any “congressional intent absolutely to exclude” the Chinese wives and children of merchants. The Immigration officials refused admission without reference to the provisions of Sections 25 and 28(g) of the 1924 Act,<sup>20</sup> but solely on “*the inhibition \* \* \* found in paragraph (c) of section 13 and that portion of section 5 which reads \* \* \* ‘An alien who is not particularly specified in this act as a nonquota immigrant or a non-immigrant shall not be admitted as a nonquota immigrant or a nonimmigrant by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration.’*” The decision further recites that the rule in the *Mrs. Gue Lim* case “*\* \* \* was not unknown to Congress when considering the \* \* \**” 1924 Immigration Act. The express mention of wives and minor children of merchants was not included in the wording of the treaty. The authority for their entry nevertheless existed by implication as stated in the *Mrs. Gue Lim* case. *It was, therefore, unnecessary for Congress by express terms to mention them in the enactment of Section 3 (6) of the 1924 Act providing for the admission of merchants. “Merchants,” their wives and children are then “In a very definite sense \* \* \* specified by the Act itself as ‘nonimmigrants.’*” It was unnecessary for the Court to consider Sections 25 and 28(g) of the 1924 Act, *because it found no intention*

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<sup>20</sup>Secs. 25 and 28(g), 1924 Act (43 Stat. 166, 168-169; 8 U. S. C. 223, 224). Also see *U. S. v. Hughes*, 9 F. Supp. 792, 796.

on the part of Congress to exclude from the use of the term “merchant” in Section 3 (6) of the 1924 Act, the “implicative” rights to admission of the wives and children that had existed in the use of that term for “25 years.” This construction harmonizes the 1924 Act with the treaty. Otherwise, the Court would have been compelled to have given some expression to reasons why the provisions of Sections 25 and 28(g) of the 1924 Act did not in clear and unmistakable language make excludable any alien although admissible under any “treaties” “\* \* \* if he is excluded by any provisions of \* \* \*” the 1924 Immigration Act. This is the rationale of the decision in the *Cheung Sum Shee v. Nagle* case.

Appellee contends that the right of wives and minor children to join after 1924 a merchant admitted prior to the effective date of the 1924 Act, is determinable solely on the laws that existed at the time of the merchant’s admission. The 1924 Act provided an alien, in addition to being admissible under any “treaties,” must also comply with all of the requirements for admission under the Act itself. The contention of appellee, if sustained, would result in the setting up of a class of aliens who after 1924 could enter and re-enter without regard to the express provisions of the 1924 Act.

The character of the Immigration status of “merchant” in relation to naturalization is significantly shown in the decision of a court<sup>21</sup> in denying naturalization to a native born citizen of the United States upon her return to this Country under the status of wife of an Italian treaty

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<sup>21</sup>*In re Pizzi*, 29 F. (2d) 999, 1002.

merchant following loss of her citizenship by marriage in 1920:

“Has the petitioner here met the requirements of the law? I think not. The petitioner has no status in the United States, other than being the wife of her husband. Her husband’s status is defined by the provisions of section 3, of the Quota Act of 1924 and the treaty of commerce and navigation between the United States and Italy of 1871 (17 Stat. 845). This treaty defines the status of ‘Italian citizens in the United States and citizens of the United States in Italy.’ Article 1. It clearly contemplates the temporary stay of the merchants of one country in the territory of the other. It accentuates the fact that the citizen of one country is entitled to certain rights and privileges in the other country, including the privilege of being accompanied by wife, minor children, servants, etc., solely and wholly because such citizen of one country is in the other country temporarily and for no other purpose than to carry on trade. There is not the slightest thought involved in the language of the treaty that the citizen of one country, residing in the other country as a treaty merchant, is laying the foundation for becoming a citizen of the other. Everything in the treaty negatives that thought.”

Judicial expression again classes merchants with those aliens whose sojourn in this country is of a temporary character:<sup>22</sup>

“\* \* \* aliens who seek admission to the United States are divided into three classes: nonimmigrants, nonquota immigrants and quota immigrants, 8 U. S. C. A. Secs. 203, 204, 205. Nonimmigrants are al-

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<sup>22</sup>*U. S. v. Carusi*, 72 F. Supp. 195.



lowed admission under a policy of promoting good relations among the peoples of the world; *c.g.*, the two most numerous groups in this class are alien seamen, members of a crew, and alien visitors, on business or pleasure. Petitioner, a treaty merchant, falls into this class, and was entitled to enter the United States solely to carry on trade authorized by the provisions of a treaty of commerce and navigation with the country of which he was a national."

### **Certain Actions of the Immigration and Naturalization Service Not of Binding Effect on This Court.**

Appellee contends that the Government holds "an inconsistent view" (Br. p. 13) because of certain actions of the Immigration and Naturalization Service with respect to applications of Chinese merchants for citizenship where admission occurred prior to July 1, 1924.

Chinese admitted as merchants prior to the effective date of the basic naturalization act of June 29, 1906, like other aliens, are not required to file with their applications for naturalization, certificates showing lawful admission for permanent residence. It is only necessary that such aliens establish that the residence acquired prior to 1906 has not been abandoned. Since Chinese became racially eligible for naturalization on December 17, 1943, it is true that in a very limited number of cases no opposition has been made to the naturalization of Chinese admitted as "merchants" subsequent to 1906 and prior to July 1, 1924. Such action over a brief period of time in a limited number of cases cannot have any binding effect in the instant determination. It only emphasizes the need for judicial clarification for the guidance of the Immigration and Naturalization Service as that problem may be relevant to the present issue.

## Relevancy of Immigration Status as a Basis for Naturalization.

Appellee raises the further contention that none of the cases relied on by the Government as listed in his brief (Br. pp. 10, 11, 12) are in point, because none of the cases relate to an admission pursuant to the treaty with China.

Appellee's qualifications for naturalization founded on the immigration status of "son of a merchant" must be measured in the terms of the nationality Act in deciding whether he has been "lawfully admitted for permanent residence" as that phrase is used and construed under the naturalization laws. Residence which may be deemed lawful for immigration purposes may not meet the rigid tests for naturalization.<sup>23</sup>

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<sup>23</sup>*In re Sinmiolkjier*, 71 F. Supp. 553; App. Br. p. 23. See also 8 C. F. R. 110.38, which provides:

"Citizens of Canada or Newfoundland who entered the United States across the Canadian border prior to October 1, 1906, and citizens of Mexico who entered across the Mexican border prior to July 1, 1908, shall, for re-entry purposes, be presumed to have been lawfully admitted even though no record of their original entry can be found. [Sentence amended: effective October 17, 1945; published 10 F. R. 12956, October 18, 1945.] Aliens who entered the Virgin Islands of the United States prior to July 1, 1938, shall, for purposes of re-entry at any port of entry, be presumed to have been lawfully admitted for permanent residence even though no record of their original entry can be found or even though a record of their admission as nonimmigrants is found. Any alien within the terms of this section shall upon application for readmission to the United States be inspected and be subject to the requirements of the immigration laws and regulations the same as if the original presumed lawful entry was by recorded admission for permanent residence; and if no record exists of a re-entry since such presumed lawful entry, the alien shall be regularly manifested for the purpose of recording the application for re-admission. Nothing in this section shall be deemed to preclude

The rule of construction in naturalization matters is succinctly stated by Mr. Justice McReynolds as follows:<sup>24</sup>

“An alien who seeks political rights as a member of this nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare.”

Chinese as well as other aliens whose residence in this country began prior to the effective date of the Immigration Act of 1924, upon regularizing their entries through registry proceedings,<sup>25</sup> may then meet the requirements for naturalization without departing and re-entering the United States. The naturalization laws specifically provide that a registry of entry when so created is sufficient.<sup>26</sup> The appellee cannot avail himself of this privilege since his admission occurred subsequent to July 1, 1924. He

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an alien qualified to do so from applying for registry under section 328(b) of the Act of October 14, 1940 (54 Stat. 1152; 8 U. S. C. 728b).”

It is further provided in 8 C. F. R. 363.7 that:

“No certificate of arrival shall be issued in behalf of an alien on the basis of an original entry which under the provisions of Sec. 110.38 of this chapter is presumed for re-entry purposes to have been a lawful admission for permanent residence. A certificate of arrival will be issued on the basis of the re-entry of such an alien where there is a manifest record showing that the entry was by lawful admission for permanent residence. [Section added: effective January 9, 1945; 10 F. R. 447, January 11, 1945.]”

<sup>24</sup>*U. S. v. Ginsberg*, 243 U. S. 472, 37 S. Ct. 422, 61 L. Ed. 853.

<sup>25</sup>Sec. 328(b), Nationality Act of 1940 (54 Stat. 1152; 8 U. S. C. 728).

<sup>26</sup>Sec. 328(c), Nationality Act of 1940 (54 Stat. 1152; 8 U. S. C. 728). See also App. Br. p. 37.

may, however, have created a registry of entry for naturalization purposes by departing from the United States and re-entering under the status of a preference quota immigrant by reason of his marriage to an American citizen subsequent to July 1, 1932.<sup>27</sup>

Respectfully submitted,

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<sup>27</sup>Sec. 6, 1924 Immigration Act (43 Stat. 155-156; 47 Stat. 656; 45 Stat. 1009; 8 U. S. C. 206).

No. 11,669

IN THE

# United States Circuit Court of Appeals FOR THE NINTH CIRCUIT

DIVISION OF LABOR LAW ENFORCEMENT, STATE OF CALIFORNIA, statutory assignee etc.,

*Appellant,*

*vs.*

GEORGE T. GOGGIN, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF KESSCO ENGINEERING CORPORATION, and HARRY C. WESTOVER, Collector of Internal Revenue for the Sixth Collection District of California,

*Appellees.*

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

## BRIEF FOR THE COLLECTOR.

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## BRIEF FOR THE COLLECTOR.

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### Opinion Below.

The court below did not file a written opinion. The findings of fact and conclusions of law of the Referee in Bankruptcy, which were adopted as its own, and the order of the referee, which was in all respects confirmed by the court below [R. 35-36], are set out in the record at pages 9 to 14, inclusive.<sup>1</sup>

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<sup>1</sup>By order of the District Court [R. 47], the appellant was allowed to prosecute this appeal *in forma pauperis* and the record on appeal has not been printed.

## Jurisdiction.

This proceeding arose in the District Court of the United States for the Southern District of California, Central Division, upon a voluntary petition in bankruptcy [R. 2-3], filed pursuant to Section 18 of the Bankruptcy Act, as amended, by Kessco Engineering Corporation, a California corporation, with its principal place of business at Los Angeles, California, on March 26, 1946, and an adjudication of bankruptcy and general reference made by that court on the same date [R. 4]. Jurisdiction of the court below in the premises is conferred by Section 11 of the Bankruptcy Act, as amended. Under date of October 17, 1946, the Trustee in Bankruptcy filed a petition, stating that the Collector of Internal Revenue and the Department of Employment of the State of California had filed certain tax claims, claiming a lien upon the assets in the hands of the trustee, and that in addition thereto certain labor claimants asserting prior labor claims had filed their labor claims either through the Division of Labor Law Enforcement of the State of California or individually, and requesting that an order be issued requiring such claimants to appear and show cause why the order of priority of payment of their claims and of the expenses of administration should not be determined by the court [R. 5-6, 24]. An appropriate order to show cause was issued under date of October 18, 1946 [R. 7-8, 24]. A hearing pursuant to the order to show cause was held before the referee on October 30, 1946 [R. 9, 24], on the basis of which the referee, under date of December 12, 1946, entered his findings of fact, conclusions of law, and order [R. 9-14]. Under date of December 17, 1946, the Division of Labor Law Enforcement, Department of

Industrial Relations, State of California, representing all prior wage claimants [R. 9, 36], filed a petition for review by the court below of the referee's order of December 12, 1946 [R. 15-22]. The referee's certification petition for review of the order of December 12, 1946 [R. 23-29], was filed with the court below on January 20, 1947 [R. 29], and a minute order affirming the referee's order of December 12, 1946, was entered by the District Court under date of March 31, 1947 [R. 31]. Notice of appeal from such minute order was filed by the Division of Labor Law Enforcement, Department of Industrial Relations, State of California, pursuant to Section 25(a) of the Bankruptcy Act, as amended, on April 28, 1947 [R. 32]. Under date of May 6, 1947, the referee filed with the District Court a supplemental certificate on the petition for review giving the names of all prior wage claimants represented by the Division of Labor Law Enforcement and the amount of their respective claims [R. 33-34], and on May 21, 1947, the District Court entered its judgment confirming the order of the referee and adopting as its own the findings of fact and conclusions of law of the referee [R. 35-36]. Notice of appeal was filed May 21, 1947 [R. 48].

The jurisdiction of this Court to hear and determine this appeal is conferred by Section 24(a) of the Bankruptcy Act, as amended, and Section 128(c) of the Judicial Code.

### Question Presented.

The only question involved is whether the court below, in affirming the order of the referee in bankruptcy, erred in holding that under the facts the Collector of Internal

Revenue has a lien superior to all other claims on the funds which will remain in the hands of the trustee in bankruptcy after costs of administration as allowed by the court have been paid.

### Statutes Involved.

The applicable provisions of the Bankruptcy Act, as amended, are printed in the Appendix, *infra*, pp. 1-3.

### Statement.

The court below adopted as its own findings of fact [R. 31, 35-36], the findings of fact made by the referee in bankruptcy [R. 9-12], which are, briefly, that prior to the commencement of the present bankruptcy proceedings on March 26, 1946, the Collector of Internal Revenue for the Sixth Collection District of California, one of the appellees here [R. 10]—

was in physical possession of the personal property of the within bankrupt having made a seizure pursuant to the tax claims of the Collector

against the bankrupt in the sum of \$40,921.94,<sup>2</sup> and that in addition to having made a physical seizure of the personal property of the bankrupt, Kessco Engineering Corporation, the Collector, had, prior to March 26, 1946, filed notices of lien with respect to various taxes, including the taxes here involved [R. 10].<sup>3</sup>

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<sup>2</sup>According to a schedule of assessments attached as an exhibit to the finding of the referee [R. 10, 14].

<sup>3</sup>By stipulation of the parties the original claim for \$40,921.94 was disallowed, and was superseded by an amended claim for the sum of \$78,865.03 [R. 10].

On or about April 27, 1946, the Department of Employment of the State of California filed a tax claim with the trustee in the sum of \$15,135, which had been recorded as a lien on or about December 24, 1945 [R. 10-11].<sup>4</sup>

Certain labor claims also were filed with the trustee. In a petition to show cause why the tax and labor claimants should not have their respective priorities determined by the court below, the trustee listed certain labor claimants who had either filed their claims individually or through the Division of Labor Law Enforcement of the State of California [R. 5-6]. The referee found that such claimants had owing to them as of March 26, 1946, the date of commencement of the bankruptcy proceedings, for services rendered to the bankrupt within 90 days prior to the adjudication in bankruptcy, the total sum of \$2,838.79, and that the Division of Labor Law Enforcement was appearing on behalf of all such claimants [R. 11]. In his supplemental certificate on the petition of the Division of Labor Law Enforcement for review by the court below of his order determining priorities, the referee listed labor claimants having filed labor claims in the total sum of \$3,424.87 [R. 33-34].

After the adjudication in bankruptcy the personal property of the bankrupt then in the possession of the Collector of Internal Revenue was turned over by the Collector to the trustee in bankruptcy, who accepted it subject to the terms and conditions of a telegram from J. P.

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<sup>4</sup>This claim does not seem to be involved in the present appeal.

Wenchel, then Chief Counsel of the Bureau of Internal Revenue, which reads as follows [R. 11-12]:

Reference to telephone conversation today with Mr. Webb relative to Kessco Engineering Corporation, Bankrupt, no objection by this office to Collector relinquishing personal property to Trustee for sale. Government's lien to attach to proceeds from sale subject to Trustee's expenses including costs of sale.

J. P. WENCHEL  
Chief Counsel.

In his certificate on the petition for review of his order of December 12, 1946, covering the disbursement of assets of the bankrupt estate [R. 23-29], the referee elaborated upon the foregoing findings to the extent of stating that the trustee had liquidated all of the assets which had come into his possession and that the funds which he has on hand are insufficient to pay in full the expenses of administration, the lien claims, and the prior labor claims and prior tax claims [R. 23]; that the Collector of Internal Revenue and the Department of Employment of the State of California (representing the prior labor claimants) had asserted liens which were in effect at the time of the commencement of the receivership proceeding [R. 23-24]; that at the hearing before the referee it was conceded by all parties concerned that at the time of the commencement of the bankruptcy proceeding the Collector was in physical possession of all the assets of the bankrupt later liquidated by the trustee and that the Collector at that time had a valid lien on such assets of the bankrupt superior to all other claimants in the matter [R. 24]; that the Division of Labor Law Enforcement, representing the prior labor claimants, took the position that by surrendering the physical possession of the assets in

question to the then receiver, had lost the superior position which his lien had theretofore enjoyed [R. 24, 25].

In that part of his certificate dealing with the evidence in the case the referee stated that on the date of the commencement of the bankruptcy proceeding the assets of the bankrupt, later liquidated by the trustee, were in the physical possession of the Collector of Internal Revenue [R. 26]. The Collector previously had made a seizure of the assets of the bankrupt pursuant to certain tax claims asserted against the bankrupt [R. 26]. In addition to having made physical seizure of the property of the bankrupt the Collector had, prior to commencement of the bankruptcy proceeding, filed notices of lien with respect to various taxes, including the taxes here involved, and that pursuant to his legal rights in the premises the Collector had conducted a sale of the assets involved and received bids thereon [R. 26-27]; that the sale was not completed because the price obtained was unsatisfactory, and that a second sale by the Collector was instituted but was abandoned when the assets of the bankrupt then in his possession were delivered to the receiver (now trustee) of the bankrupt estate [R. 27]. Upon his appointment and qualification as receiver, he contacted the Collector of Internal Revenue and conversations were had between the receiver and counsel in the Los Angeles office of the Collector relating to the turning over to the receiver of the assets of the bankrupt in the possession of the Collector. These conversations culminated in the receipt by the Collector of the foregoing telegram from the Chief Counsel of the Bureau of Internal Revenue, on the basis of which the Collector turned over to the referee the seized assets of the bankrupt which were in his possession at the time of commencement of the bankruptcy proceeding [R. 27].

In his certificate to the court below, mentioned above, the Referee in Bankruptcy said the contents of the telegram from the Chief Counsel for the Bureau of Internal Revenue were imparted by telephone to the office of the receiver and that no formal acceptance or acknowledgment of it was made by the receiver. No notice of the telegram or its contents was given to any of the creditors of the bankrupt or other parties in interest in the bankruptcy proceeding, and no notice thereof was given at the time of trustee's sale of the assets involved. After the contents of the telegram in question had been imparted to the office of the trustee, the trustee, with full knowledge of the telegram from the Chief Counsel of the Bureau of Internal Revenue and of its contents, and without any objection thereto, took over the possession of the assets from the Collector. Later the receiver, in his capacity as Trustee in Bankruptcy, caused the assets involved to be sold at public auction pursuant to order of the court below [R. 28].

On the basis of the evidence before him the Referee in Bankruptcy concluded as a matter of law that the expenses of administration should first be paid from the funds in the hands of the trustee, and that after payment of such expenses of administration the Collector of Internal Revenue has a lien superior to all other claimants upon the balance of the funds (insufficient to pay the full amount of his secured tax claims) by reason of his seizure of the property of the bankrupt prior to commencement of the bankruptcy [R. 12]. The trustee's conclusions of law and order entered in accordance therewith [R. 12-13] were in all respects affirmed by the court below [R. 31, 35-36].



## Summary of Argument.

The lien of the Collector of Internal Revenue for unpaid taxes was, under the circumstances of this case, superior to all other liens and claims except costs of administration, which the Government had expressly agreed should be paid ahead of the claim for taxes. At the time the petition in bankruptcy was filed the Collector was, pursuant to his lien for taxes, in physical possession of the personal property of the bankrupt, and in that situation the Collector had a lien on the property here involved superior to all other claims. Under Section 67c of the Bankruptcy Act, as amended, the property was not subject at the time of bankruptcy to the priority in payment prescribed by Section 64a of the Act.

After the adjudication in bankruptcy the Collector, following negotiations looking to such an arrangement, released to the Receiver in Bankruptcy, for sale, the personal property of the bankrupt, pursuant to authority from the Chief Counsel for the Bureau of Internal Revenue, which authorized such release on the condition that the Government's lien should attach to the proceeds from the sale "subject to Trustee's expenses including costs of sale." The conditions thus attached by the Government to the release and sale of the personal property involved did not subordinate the secured claim of the Collector to prior wage claims against the bankrupt estate.

The rights of the parties here involved were properly determined by the court below in accordance with the agreement of the Government and the Referee in Bankruptcy. Wage claimants were not necessary parties to that agreement and obtained no additional rights thereby.

## ARGUMENT.

**The Court Below Did Not Err in Holding, Under the Facts, That the Collector of Internal Revenue Has a Lien Superior to All Other Claims Upon the Balance of Funds Remaining in the Hands of the Trustee After Payment of Expenses of Administration.**

The legal question involved in this case appears to be unique. The referee found [R. 9-10], and the appellant admits (Br. 5, 7), that at the time of the commencement of the bankruptcy proceeding the Collector was in possession of all the personal property of the bankrupt, having seized such property to satisfy outstanding liens of the Federal Government. The appellant, inferentially at least (Br. 7), admits that by reason of his possession of the personal property of the bankrupt prior to the adjudication, he had a lien superior to all other claimants. The appellant even goes to the extent of pointing out that the Collector could have avoided this controversy if he had retained possession of the property involved and foreclosed his tax liens by separate sale of the property in question (Br. 13).

The contention of the appellant is that by surrendering possession of the personal property of the bankrupt, the Collector lost the priority in payment which otherwise was assured him by the Bankruptcy Act, as amended, and that his claim for payment is thereby relegated to an inferior position and can be paid only after the payment of expenses of administration and prior wage claims (Br. 11-15); that any private agreement between the receiver or trustee and the Collector of Internal Revenue concerning the attachment of statutory liens to the proceeds of a trustee's sale, when possession of the personal property of

the bankrupt was voluntarily transferred to the receiver or trustee, would not be binding upon prior wage claimants (Br. 15-18); and that under Section 67c of the Bankruptcy Act, as amended [Appendix, *infra*], administration expenses and wage claims are jointly given priority over statutory liens not accompanied by possession (Br. 18-19). As a part of this argument it is insisted (Br. 12-15) that the possession of the lienholder contemplated by Section 67c of the Bankruptcy Act, as amended "means actual possession prior to and subsequent to filing of the petition in bankruptcy."<sup>5</sup> The authorities cited by the appellant (Br. 13-15) do not require this construction of the applicable section of the Bankruptcy Act and we know of no authority which does require such construction.

While the appellant's argument, unsupported by any convincing authority, is based upon the proposition that the Collector, by surrendering possession of the personal property of the bankrupt to the receiver, thereby lost all priorities under the statute, the conclusion of the referee and the decision of the court below are based upon an entirely different understanding of the facts and the law. In his certificate on the appellant's petition for review of his order of December 12, 1946, the referee points out [R. 24-25] that he rejected the contentions of the appellant and held that—

under the terms and conditions of the relinquishment by the Collector to the then receiver in this matter of the physical possession of the aforesaid assets

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<sup>5</sup>This is the same theory advanced by the appellant in its petition for review of the referee's order of December 12, 1946 [R. 15-22].

the Collector had a lien on the proceeds of the trustee's sale superior to all other claimants and subject only to the payment of the expenses of administration as allowed by the bankruptcy court. In his statement of the questions presented [R. 25-26], the referee still further amplifies the basis of his decision to the extent of pointing out that it was based upon the agreement of the parties most directly interested rather than upon the provision of the Bankruptcy Act which would have been controlling in the absence of such agreement.

In other words, the referee and the court below have given effect to the considered agreement of the trustee and the Government, which was the only party fully covered and protected by the statute, while the appellant is contending that any such agreement is a nullity under the Bankruptcy Act.<sup>6</sup> Any such notion certainly is not in keeping with the spirit of the Bankruptcy Act, and is not supported by any of the authorities cited by the appellant (Br. 11-19).

Section 64a of the Bankruptcy Act, as amended [Appendix, *infra*], provides for the payment of debts of the bankrupt, including taxes, having priority before any payment distribution to general creditors, and specifies the order of such payment. Expenses of administration of the bankrupt estate are given first priority; wages, not to exceed \$600 to each claimant, are to be paid next. Sec-

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<sup>6</sup>Certainly the Collector could not have released the assets of the bankrupt under any conditons other than the conditions authorized by the Commissioner of Internal Revenue, and it is extremely doubtful whether, as a matter of law, the Commissioner or the Collector could have released the property under any conditions other than those authorized.

tion 67b of the Act, as amended [Appendix, *infra*], relates to certain classes of liens, including liens for taxes and debts owing to the United States, and Section 67(c), upon which the appellant principally relies in this proceeding, provides that where not enforced by sale before the filing of a petition in bankruptcy, though valid under subsection (b) of Section 67, such statutory liens, including liens for taxes or debts owing the United States, "on personal property not accompanied by possession of such property," and liens whether statutory or not, of distress for rent shall be postponed in payment of the debts (costs of administration and labor claims) specified in clauses (1) and (2) of Section 64a of the Bankruptcy Act, as amended.

If the tax liens of the Collector here involved had not been "accompanied by possession" of the personal property of the bankrupt at the time the petition in bankruptcy was filed, his tax claims would have been deferred in payment until after the payment of costs of administration and labor claims as provided in Section 64a of the Bankruptcy Act. But his liens for the taxes here involved were accompanied by possession of the personal property of the bankrupt at the time the action was commenced, and there is nothing in the Bankruptcy Act which would justify holding that his possession of such property must be retained in order to protect the priority in payment which he then enjoyed.

The appellant admits (Br. 12) that the question of possession was not involved in the first two cases cited for the proposition that wage claimants represented by the appellant are entitled to priority in payment under Section 67c of the Bankruptcy Act, as amended. Nor do the authori-

ties cited therefor (Br. 12-15) support the appellant's contention that the possession by the lienholder contemplated by Section 67c of the Bankruptcy Act is actual possession "prior to and subsequent to" (Br. 12) filing of the petition in bankruptcy. Here the Collector had actual possession of the personal property of the bankrupt both "prior to" and "subsequent to" the filing of the petition, until it was released to the receiver on condition that the Collector's claims should be paid ahead of all other claims after payment of costs of administration. What the appellant apparently contends is that by surrendering possession of the assets in question to the receiver, regardless of the terms and conditions under which property was surrendered, the Collector lost the priority which he previously enjoyed by reason of his physical possession of the personal property of the bankrupt. The authorities cited (Br. 13-17) do not so hold.

*In re Jackson Brick & Tile Co.*, 189 Fed. 636 (Mo.), is cited (Br. 15) for the proposition that where a lienor voluntarily appears before a referee, presents his claim as a secured claim, and seeks its allowance, the referee may summarily determine the validity of the lien so asserted. We do not question this general principle of bankruptcy law. In the instant case the referee determined the validity of the Government's lien on the basis of the facts presented to him and there is nothing in the case just cited to indicate that his determination was wrong.

*Straton v. New*, 283 U. S. 318, cited by the appellant (Br. 13), does not have even a remote bearing upon the question here involved. It is cited only as authority for the assertion that if the Collector had proceeded with the sale of the personal property of the bankrupt then in his

possession the trustee could have appeared in the sale proceeding and seized for the bankrupt estate any excess of the proceeds after the Collector's lien had been satisfied. Also, the quotation from 5 Remington on Bankruptcy (4th Ed.), 330 (Br. 13) is not authority for the proposition that the Collector could not surrender to the receiver the personal property of the bankrupt under an agreement which would protect his priority after payment of the costs of administration.

*In re San Joaquin Valley Packing Co.*, 295 Fed. 311, cited by the appellant (Br. 14), was decided by this Court long before Section 67c of the Bankruptcy Act was amended by the Act of 1938, and the decision there had no bearing upon the question here involved. Likewise, *City of New York v. Hall*, 139 F. (2d) 935 (C. C. A. 2d), cited by the appellant (Br. 14), is not in point. That case holds only that "constructive possession" by a prior lien claimant is not sufficient under Section 67c of the Bankruptcy Act, as amended, to defeat the priority given to costs of administration and labor claims by Section 64(a) of the Act. But in this case it is admitted that the Collector had *actual* possession of the assets in question at the time the bankruptcy proceeding was instituted. In that respect the case is similar to *Davis v. City of New York*, 119 F. (2d) 559 (C. C. A. 2d), except that in the latter case the attached property was sold by the taxing authorities instead of being turned over to the referee under an agreement preserving the priority of such taxing authorities.

*In re Jay & Dee Store Co.*, 37 F. Supp. 989 (E. D. Pa.), cited by the appellant (Br. 14-15), likewise is not a case involving a lien for taxes "accompanied by posses-

sion” of personal property of the bankrupt, and does not involve the right of such a lienor to deliver such property over to the referee under an agreement which would protect his priority. Instead, the case involves a claim for rent—rather than a claim for taxes—and Section 67c of the Bankruptcy Act, as amended, makes a clear differentiation between liens for taxes “accompanied by possession” and liens for rent. Tax claims are not subordinated by Section 67c to the payment of costs of administration and wage claims where the tax lien is “accompanied by possession” of the personal property subject to the lien, while liens for rent are subordinate to such claims, regardless of whether accompanied by possession, provided the lien for rent has not been enforced by sale prior to bankruptcy.<sup>7</sup>

*In re Lebed*, 39 F. Supp. 457 (E. D. Pa.), cited by the appellant (Br. 15-16), also is distinguishable from the instant case because it also involved a lien for rent rather than a lien for taxes “accompanied by possession” of the attached property of the bankrupt.

*In re Lebed*, *supra*, is cited and quoted from by the appellant principally in support of its contention (Br. 15-18) that any agreement between the receiver or trustee and the Collector concerning the attachment of the Collector’s statutory lien to the proceeds of a trustee’s sale under the circumstances here involved would not be binding on the prior wage claimants. That case, as must the instant case, turned upon its own peculiar facts. It appears that

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<sup>7</sup>For a full discussion regarding the subordination of liens for taxes, rents, etc., to administration expenses and wage claims, see 4 Collier on Bankruptcy (14th Ed.), pars. 67.27 and 67.28, p. 234-250.



in that case certain creditors had induced the rent claimants to postpone until after bankruptcy the sale to enforce their liens for rent. This postponing inevitably made applicable the subordinating provisions of Section 67c of the Bankruptcy Act. Upon equitable principles the court naturally held that the creditors who had induced the lessors to postpone the sale should not benefit by the subordinating provisions of Section 67c. However, the creditors who had not joined in inducing the lessors to postpone their sale and who had not entered into any agreement relative thereto were, of course, free to claim the benefit of Section 67c.

There is a marked contrast between the *Lebed* case, *supra*, and the instant case because in the *Lebed* case the rent claimants had been subordinated by Section 67c and could only escape such subordination to the extent that the other creditors involved could be estopped to claim priority under Section 64a of the Act. Here, however, the Collector had possession of the personal property at the time of bankruptcy and payment of his claim was not subordinate to the costs of administration and wage claims. Hence, we perceive no reason why he was not free to enter into any kind of an agreement with the receiver for the sale of such assets without subordinating his claim to prior wage claims. Nor do we perceive any reason why the wage claimants would have to be made parties to such an agreement in order to effectively protect the existing priority of the Government. The Collector's action effected approximately the result, except for a possible difference in the amount of the proceeds received, that would have obtained if the Collector had sold the property involved in order to satisfy his tax liens rather

than releasing it to the receiver for sale. To hold that under the circumstances his tax claim must be subordinated to the wage claims involved would be inequitable, to say the least. It has long been recognized that bankruptcy courts have power to sell property free from liens and transfer the liens to the proceeds of sale (*Van Hufel v. Harkelrode*, 284 U. S. 225), and such power is particularly clear in this situation, where the Collector consented to such sale subject to the condition that his claim should have priority after payment of costs of administration. The consent of a lienholder to such a sale is of common occurrence (4 Collier on Bankruptcy (14th Ed.), 1606-1609), and under such circumstances it is usual for the lienholder to bear his share of the costs of administration. (4 Collier on Bankruptcy (14th Ed.), 234.)

There is no merit to the appellant's final argument (Br. 18-19) that under Section 67c of the Bankruptcy Act, administration costs and prior wage claims are jointly given priority over statutory liens, and if costs of administration are to be given priority in payment over the tax claims of the Collector then wage claims must also be given the same priority. This argument ignores the fact that the decision below was based upon the agreement between the Collector and the receiver, and not upon the provisions of the statute. It is only just that the Collector should consent to the prior payment of costs of administration under the circumstances and the decision below merely gives effect to that agreement. *Freeman Furniture Factories v. Bowlds*, 136 F. (2d) 136 (C. C. A. 6th), cited by the appellant (Br. 18), is not to the contrary because there there was no agreement similar to the agreement in this case and the case was decided strictly in accordance with the provisions of the statute.

Conclusion.

The decision of the court below is right. It is supported by the facts and the law and should be affirmed.

Respectfully submitted,

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FRED E. YOUNGMAN,  
*Special Assistants to the Attorney General.*

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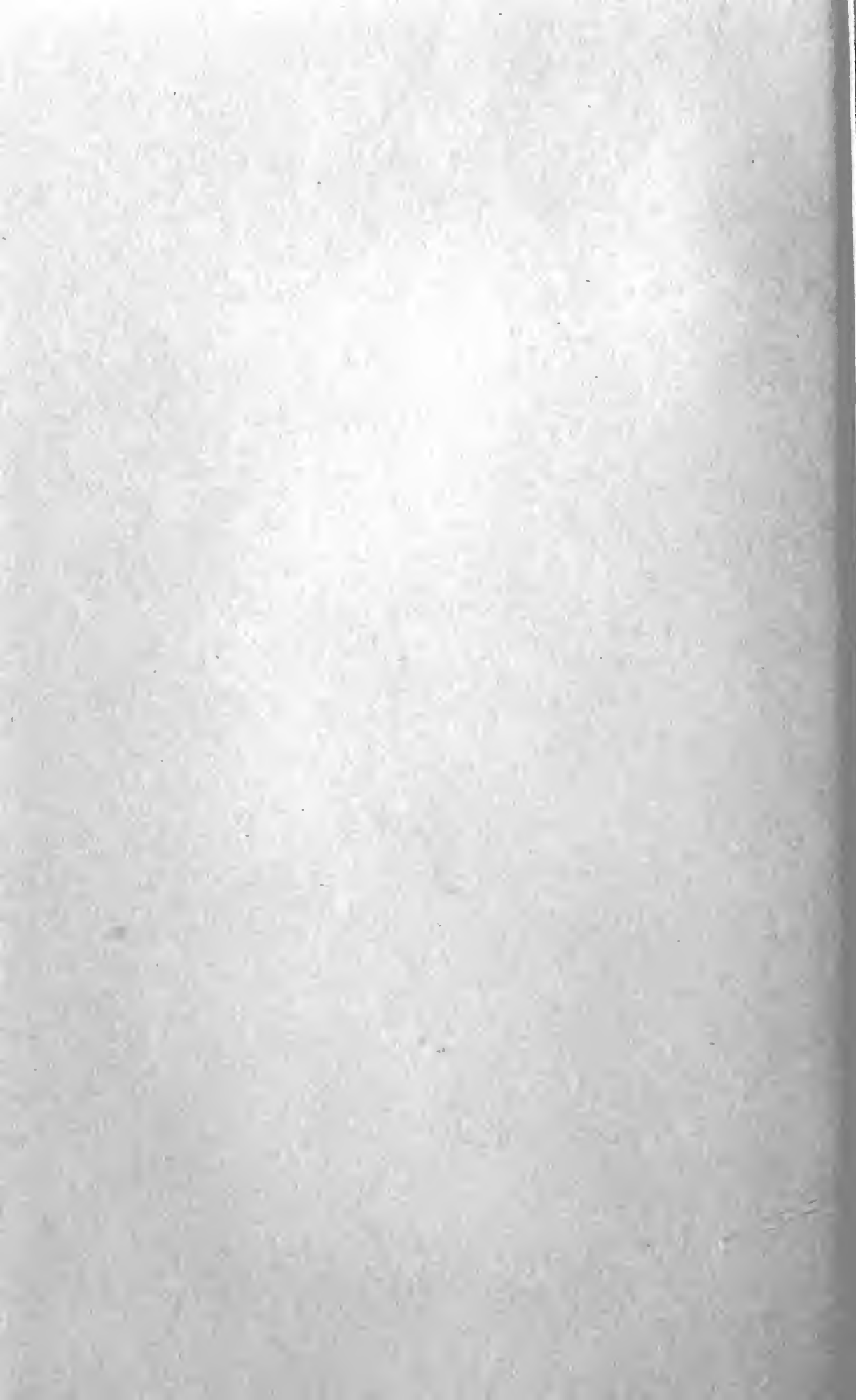
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The foregoing brief is adopted and concurred in by the undersigned on behalf of the Appellee, Trustee.

MARTIN GENDEL,  
*Attorney for Appellee, George T. Goggin, Trustee in  
Bankruptcy of Estate of Kessco Engineering Cor-  
poration.*







## APPENDIX.

Bankruptcy Act 1898, c. 541, 30 Stat. 544, as amended by the Act of June 22, 1938, c. 575, 52 Stat. 840, Sec. 1:

Sec. 64. DEBTS WHICH HAVE PRIORITY.—a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; the filing fees paid by creditors in involuntary cases; where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the cost and expense of one or more creditors, the reasonable costs and expenses of such recovery; the costs and expenses of administration, including the trustee's expenses in opposing the bankrupt's discharge, the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases and to the bankrupt in voluntary and involuntary cases, as the court may allow; (2) wages, not to exceed \$600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; \* \* \* (4) taxes legally

due and owing by the bankrupt to the United States  
or any State or any subdivision thereof \* \* \*.

\* \* \* \* \*

(11 U. S. C. 1940 ed., Sec. 104.)

Sec. 67. LIENS AND FRAUDULENT TRANSFERS.—

\* \* \*

\* \* \* \* \*

b. The provisions of section 60 of this Act to the contrary notwithstanding, statutory liens in favor of employees, contractors, mechanics, landlords, or other classes of persons, and statutory liens for taxes and debts owing to the United States or any State or subdivision thereof, created or recognized by the laws of the United States or of any State, may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition in bankruptcy or of the original petition under chapter X, XI, XII, or XIII of this Act, by or against him. Where by such laws such liens are required to be perfected and arise but are not perfected before bankruptcy, they may nevertheless be valid, if perfected within the time permitted by and in accordance with the requirements of such laws, except that if such laws require the liens to be perfected by the seizure of property, they shall instead be perfected by filing notice thereof with the court.

c. Where not enforced by sale before the filing of a petition in bankruptcy or of an original petition under chapter X, XI, XII, or XIII of this Act, though valid under subdivision b of this section,



statutory liens, including liens for taxes or debts owing to the United States or to any State or subdivision thereof, on personal property not accompanied by possession of such property, and liens whether statutory or not, of distress for rent shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act, and, except as against other liens, such liens for wages or for rent shall be restricted in the amount of their payment to the same extent as provided for wages and rent respectively in subdivision a of section 64 of this Act.

\* \* \* \* \*

(11 U. S. C. 1940 ed., Sec. 107.)



110 70-1167 D. J. J. J.

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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FRANK R. CREEDON, Housing Expediter, Office  
of Housing Expediter,

Appellant,

vs.

DOROTHY F. BORDERS,

No. 11670

MRS. A. C. SHALBERG,

No. 11672

MRS. RICHARD DAVIS,

No. 11673

ADOLPH NEUBERT,

No. 11674

L. R. CHAMBERS,

No. 11675

GEORGE ROUSE,

No. 11676

HERMAN HAGE and EDWARD C. HAGE,

No. 11677

J. H. JEFFERS, d/b/a Norblad Hotel,

No. 11678

Appellees.

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Transcript of Records

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Upon Appeals from the District Court of the United States  
for the District of Oregon

FILED

OCT 2 - 1947

PAUL R. GIBSON

CLERK



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United States  
Circuit Court of Appeals

For the Ninth Circuit.

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FRANK R. CREEDON, Housing Expediter, Office  
of Housing Expediter,

Appellant,

vs.

DOROTHY F. BORDERS,	No. 11670
MRS. A. C. SHALBERG,	No. 11672
MRS. RICHARD DAVIS,	No. 11673
ADOLPH NEUBERT,	No. 11674
L. R. CHAMBERS,	No. 11675
GEORGE ROUSE,	No. 11676
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J. H. JEFFERS, d/b/a Norblad Hotel,	No. 11678

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Upon Appeals from the District Court of the United States  
for the District of Oregon

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United States  
Circuit Court of Appeals  
For the Ninth Circuit

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FRANK R. CREEDON, Housing Expediter,  
Appellant,

VS.

DOROTHY F. BORDERS,  
Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the District of Oregon

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Portland, Oregon,  
For Appellee.

In the District Court of the United States  
for the District of Oregon

No. Civ. 3429

PHILIP B. FLEMING, Administrator Office of  
Temporary Controls,

Plaintiff,

vs.

DOROTHY F. BORDERS,

Defendant.

COMPLAINT FOR INJUNCTION AND  
TREBLE DAMAGES

Comes Now the Plaintiff above named and alleges:

Count I.

1. That the Office of Price Administration was duly created by Act of Congress pursuant to Section 201(a) of the Emergency Price Control Act of 1942, and amendments thereto; that by virtue of Executive Order 9809 (11 F.R. 14,281), issued by the President of the United States on December 12, 1946, Philip B. Fleming is the duly appointed, qualified, and acting Administrator of the Office of Temporary Controls and has been invested with all the functions of the Administrator of the Office of Price Administration.

2. That jurisdiction of this action is conferred upon this court by Section 205(a), Section 205(c), and Section 205(e) of the Act, as amended.

3. That the defendant, Dorothy F. Borders, residing at 1817 N. E. Weidler Street, Portland, Oregon, at all times hereinafter mentioned, has been the landlord and operator of housing accommodations located at the above address, within the jurisdiction of this court, and during all of said times has rented and offered for rent housing accommodations at said address.

4. That in the judgment of said Administrator, the defendant engaged in acts and practices which constitute a violation of Section 4(a) of the Emergency Price Control Act of 1942 as amended (50 U.S.C.A. 901 et seq.), hereinafter referred to as "the Act," in that the defendant has violated the Rent Regulation for Housing (10 F.R. 13528) issued in accordance with the provisions of Section 2(b) of the Act; and, therefore, pursuant to Section 205(a) of the Act, the Administrator applies to this court for the injunctions and orders hereinafter set forth to enforce compliance with said Section 4(a) of said Act.

5. That at all times mentioned herein since July 1, 1942, there has been and is now in effect the Rent Regulation for Housing issued pursuant to Section 2(b) of the Act for the Portland-Vancouver Defense-Rental Area (10 F.R. 13528) establishing regulatory provisions for the use and occupancy of housing accommodations within the Portland-Vancouver Defense-Rental Area.

6. That said Rent Regulation for Housing establishes, by Section 4 thereof, maximum rents for the

use and occupancy of housing accommodations within the Portland-Vancouver Defense-Rental Area and by Section 2(a) thereof prohibits the demand or receipt of rents higher than said established maximum rents.

7. That on or about February 6, 1946, the Area Rent Director of the Portland-Vancouver Defense Rental Area, pursuant to Section 5(c) (i) and Section 4(e) of the Housing Rent Regulation, issued orders decreasing maximum rent, effective July 1, 1942, for apartment 1 within housing accommodations located at 1817 N. E. Weidler Street, Portland, Oregon; that defendant has refused to reduce the rental for such apartment or to make refunds of excess rent collected prior to the date of issuance of the aforesaid order.

8. That more than thirty (30) days has elapsed since the occurrence of the aforesaid overcharges; that the tenant so overcharged has not instituted any actions for damages on account of said overcharge within thirty (30) days from the date thereof, pursuant to Section 205(e) of the Emergency Price Control Act, as amended and extended.

## Count II.

1. Plaintiff re-alleges and incorporates here in Paragraphs one, two, three, four, five, six and eight of Count I as fully as though set forth herein.

2. That on or about February 6, 1946, the Area Rent Director of the Portland-Vancouver Defense-Rental Area, pursuant to Section 5(c) (i) and Sec-



tion 4(e) of the Housing Rent Regulation, issued orders decreasing maximum rent, effective July 1, 1942, for apartment 2 within housing accommodations located at 1817 N. E. Weidler Street, Portland, Oregon; that defendant has refused to reduce the rental for such apartment or to make refunds of excess rent collected prior to the date of issuance of the aforesaid order.

### Count III.

1. Plaintiff re-alleges and incorporated herein Paragraphs one, two, three, four, five, six and eight of Count I as fully as though set forth herein.

2. That on or about February 6, 1946, the Area Rent Director of the Portland-Vancouver Defense-Rental Area, pursuant to Section 5(c) (i) and Section 4(e) of the Housing Rent Regulation, issued orders decreasing maximum rent, effective July 1, 1942, for apartment 3 within Housing accommodations located at 1817 N. E. Weidler Street, Portland, Oregon; that defendant has refused to reduce the rental for such apartment or to make refunds of excess rent collected prior to the date of issuance of the aforesaid order.

### Count IV.

1. Plaintiff re-alleges and incorporates herein Paragraphs one, two, three, four, five, six and eight of Count I as fully as though set forth herein.

2. That on or about February 6, 1946, the Area Rent Director of the Portland-Vancouver Defense-

Rental Area, pursuant to Section 5(c)(i) and Section 4(e) of the Housing Rent Regulation, issued orders decreasing maximum rent, effective July 1, 1942, for apartment 4 within housing accommodations located at 1817 N. E. Weidler Street, Portland, Oregon; that defendant has refused to reduce the rental for such apartment or to make refunds of excess rent collected prior to the date of issuance of the aforesaid order.

### Count V.

1. Plaintiff re-alleges and incorporates herein Paragraphs one, two, three, four, five, six and eight of Count I as fully as though set forth herein.

2. That on or about February 6, 1946, the Area Rent Director of the Portland-Vancouver Defense-Rental Area, pursuant to Section 5(c)(i) and Section 4(e) of the Housing Rent Regulation, issued orders decreasing maximum rent, effective July 1, 1942, for apartment 5 within housing accommodations located at 1817 N. E. Weidler Street, Portland, Oregon; that defendant has refused to reduce the rental for such apartment or to make refunds of excess rent collected prior to the date of issuance of the aforesaid order.

Wherefore, the plaintiff demands:

1. A preliminary and final injunction enjoining the defendant, his agents, servants, employees and all persons in active concert or participation with him from directly or indirectly demanding or receiving for accommodations subject to said Rent

Regulation for Housing rents in excess of the maximum rent permitted by said regulation as heretofore or hereafter amended or extended, or in excess of the maximum rent established by any other regulation relating to rents issued pursuant to the Emergency Price Control Act of 1942, as heretofore or hereafter amended or extended.

2. An Order directing said defendant to deliver to plaintiff's attorney of record certified checks payable to any and all tenants overcharged, in the amount of the overcharges established herein.

3. Judgment for the plaintiff on behalf of the United States of America and against the defendant in the amount of three times the established overcharges, less any payment to tenants as a result of the Order of the Court as prayed for in paragraph two above in the prayer.

4. The costs of the action expended herein.

5. Such other Order enforcing compliance with Section 4 of the Act and such further and different relief as the Court may deem just and proper.

Dated this 28 day of January, 1947.

/s/ SYLVANUS SMITH,

/s/ VICTOR E. HARR,

Assistant U. S. Attorney.

[Endorsed]: Filed Jan. 28, 1947.

[Title of District Court and Cause.]

### MOTION TO DISMISS

Comes now the defendant, Dorothy F. Borders, through and by her attorney, Dellmore Lessard, and moves the Court for an order dismissing the complaint of the plaintiff on file herein upon the following grounds:

- (a) That plaintiff has no legal capacity to sue.
- (b) That said complaint does not state facts sufficient to constitute a suit against this defendant in that it appears on the face of said complaint that plaintiff's cause of suit is founded upon the Emergency Price Control Act of 1942, which said Act expired on June 30, 1946.
- (c) That said complaint does not state facts sufficient to cause a suit against the defendant in that it appears on the face of said complaint that plaintiff's cause of suit is founded upon the Price Control Act of 1942 as amended and extended, and said Act is unconstitutional and void for the reason that said Act is in violation of the 5th Amendment to the Constitution of the United States, and also for the reason that said act pretends to assume power in behalf of the United States Government which is reserved by the Constitution to the states or to the people.

Dated at Portland, Oregon, this 19th day of February, 1947.

/s/ DELLMORE LESSARD,  
Attorney for Defendant.

A true copy mailed Sylvanus Smith, OPA attorney, Feb. 19, 1947.

[Endorsed]: Filed Feb. 21, 1947.

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[Title of District Court and Cause.]

ORDER OF DISMISSAL

Now at this day It Is Ordered that this cause be and it is hereby dismissed for want of jurisdiction.

March 6, 1947.

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[Title of District Court and Cause.]

MOTION TO VACATE JUDGMENT AND  
REINSTATE CASE ON THE DOCKET

Comes Now the plaintiff above named and respectfully moves the Court to vacate the judgment and dismissal entered in the above case and to reinstate the case on the docket.

In support of this Motion plaintiff attaches hereto and hereby makes a part hereof the attached Statement of Points and Authorities.

Dated this 16th day of May, 1947.

/s/ C. E. KNOWLTON, Jr.,

/s/ JOHN E. HEDRICK,

Of Attorneys for Plaintiff.

[Endorsed]: Filed May 17, 1947.

In the District Court of the United States  
for the District of Oregon

PHILIB B. FLEMING, Administrator,  
Office of Temporary Controls,  
Plaintiff,  
vs.

A. C. SHALBERG,	No. 3430
ADOLPH NEUBERT,	No. 3435
DOROTHY F. BORDERS,	No. 3429
L. R. CHAMBERS,	No. 3462
GEORGE ROUSE,	No. 3463
HERMAN HAGE and EDWARD O. HAGE,	No. 3464
J. H. JEFFERS, d/b/a NORBLAD HOTEL,	No. 3465
MRS. RICHARD DAVIS,	No. 3431

Defendants.

STATEMENT OF POINTS AND AUTHORITIES  
RELIED ON BY THE PLAINTIFF  
IN SUPPORT OF HIS MOTION TO VA-  
CATE JUDGMENT OF DISMISSAL AND  
REINSTATE CASES ON THE DOCKET

Each of these cases was dismissed by this Honorable Court on the 6th day of March, 1947. Since that time there have been certain decisions which the plaintiff desires to bring before this Court which the

plaintiff believes may convince the Court that it has jurisdiction in these matters, and that therefore, these cases should be reinstated on the docket and the judgment of dismissal vacated.

The question of the right of Mr. Fleming to be substituted or to commence action, the latter question which involves the same difficulties in regard to cases brought pursuant to the Emergency Price Control Act of 1942, as amended, and Executive Order No. 9809, has received the attention of several courts throughout the country. Substitutions of the validity of the commencement of these actions has been allowed in every Circuit, including the 9th, and a vast number of Districts throughout the country, without the writing of a formal published opinion. To the best of this writer's knowledge and after an exhaustive search, to date the question has been decided in written opinions by the following courts in the following cases:

Bowles v. Ell-Carr Company, Inc., ano. (Civil 33-668) by Judge Caffee of the Southern District of New York, on March 19, 1947.

Porter v. American Distilling Company, Inc., by Judge D. J. Bright, also of the Southern District of New York.

Porter v. Bowers, District Court of the Western District of Missouri.

Fleming v. Mohawk Wrecking Company by Justice Douglas of the United States Supreme Court on April 28, 1947.

All of the above cited cases were in favor of the substitution of Fleming for Porter.

Contrary opinion has been held by the District Court of Hawaii, in

Porter v. Hirahara, 60 F. supp. 441, decided  
January 19th by Judge McLaughlin,

and by the District Court of Oregon, in

Porter v. Ryan, 69 Fed. 446,

and by Judge DeVries of the California Municipal Court in Long Beach on January 30, 1947, in

Porter v. Johnson.

It is realized by the plaintiff that none of the District Court authorities cited is binding on this court. However, the plaintiff would like to quote the language of one of these District Courts as being at least persuasive. The District Court of New York in the American Distilling Company case (*supra*) after discussing the question of substantial need (which we are not concerned with here as all of these cases were originally brought in Fleming's name) the Court at length expounded on the various objections raised by the defendant in opposition to the plaintiff's Motion for Substitution.

“However, say the defendants, neither the Office of Administrator nor the Office of Price Administration has been abolished, and there can be no successor; that the statutory authorities cited by the President in the first paragraph of Executive Order 9809 as justifying his action do not help; the Office of Price Ad-



ministrator is still vacant, Fleming's appointment is as the head of a new agency, and Sec. 201(b) of the Emergency Price Control Act (which defendants contend is the only section under which the President might otherwise proceed in the instant case) has not been complied with, in that the functions of the Office of Price Administrator have not been transferred 'to any other department or agency of the Government having other functions relating to' the commodity or commodities over which the O.P.A. has exercised jurisdiction. This is particularly so, it is argued, because prior to December 12, 1946, when Porter resigned, the Office of Temporary Controls did not exist, and, therefore, did not have any functions then exercised by the OPA.

Let us examine the authorities cited in the Order.

Title I of the First War Powers Act of December 18, 1941, is found in 50 U.S.C. App. Secs. 601-605. By Sec. 601 the President is authorized by Congress 'to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties and powers hitherto by law conferred upon any executive department commission, bureau, agency, governmental corporation, office, or officer, in such manner as in his judgment shall seem best fitted to carry out the purposes of this title, and to this end is authorized to make such regulations and to issue such or-

ders as he may deem necessary \* \* \*. Provided further That the authority by this title granted shall be exercised only in matters relating to the conduct of the present war.”

By Sec. 602 the President was authorized to utilize, coordinate or consolidate any executive or administrative commissions, bureaus, agencies, office or officers then existing by law and to transfer any duties or powers from one existing department, agency, office or officer to another.

It has been held that, under the wording of Sec. 601, the powers conferred upon the President to transfer functions was intended to extend to any and all functions, whether existing before or after the passage of the First War Powers Act; and this was in a case where the right of the President acting under that section, enacted in December, 1941, was questioned in transferring by executive order the right to approve maximum price regulations conferred upon the Secretary of Agriculture by Sec. 3(e) of the Emergency Price Control Act, enacted in January, 1942, to the War Food Administration. *California Lima Bean Growers Assn. v. Bowles*, 150 F. (2) 964-966.

While Sec. 601 does not specifically state that new agencies may be created which will consolidate functions of other agencies, the statute has been construed as authorizing such action. The functions of the Federal Housing Administration, Federal Home Loan Bank Board, Home Owners Loan Corporation, Federal Savings and Loan Insurance Com-

pany, and the United States Housing Authority were consolidated in the National Housing Agency. (Ex. Order 9070, 7 F.R. 1529, Feb. 24, 1942); and later the War Food Administration was created to include many agencies relating to food (Ex. Orders 9322, of March 26, 1943, amended by Ex. Order 9334 of April 19, 1943; Code of Fed. Reg., Cum. Suppl., Titles 1-3, pgs. 1262, 1293. See also Executive Order 9347 (8 F.R. 7207) consolidating May 27, 1943, other agencies in the Office of War Mobilization; Executive Order 9361 (8 F.R. 2071) in the Office of Economic Warfare on July 15, 1943; and in the Surplus War Property Administration on Feb. 19, 1944, by Order 9425 (9 F.R. 2071). This construction by the Executive, it is settled, is entitled to persuasive weight. *Billings v. Truesdell*, 321 U.S. 542-552. And Congress has appropriated funds for the use of these agencies, indicating its acquiescence in such construction, particularly where, with knowledge, it fails to amend the Act.

*Brooks v. Dewar*, 313 U. S. 354, 361.

It is argued that the word "executive" as used in Sec. 601 has some special meaning, and must be distinguished from agencies created by Congressional Act, as in the Emergency Price Control Act. I cannot see that the word "executive" as used means anything more than a bureau, commission or agency created to exercise executive duties. The section does not attempt to distinguish a body or office erected by executive order from one erected by Congressional enactment. As a matter of fact, the

power to create any agency or office given to the President, is conferred by Congressional Act, and there would seem to be no logical distinction between any agency established by Congress by an Act and an agency established by Congress through an Act delegating to the President the Congressional power to establish such agency. And the multitude of words used in Sec. 601—"including" functions, duties and powers conferred upon any "executive department, commission, bureau, agency, governmental corporation, office or officer"—shows a much more comprehensive construction than the definition to which defendants seek to limit "executive."

United States v. Paramount Publix Corporation, 73 F. (2) 103.

It has been said that the court must not hunt for limitations or scrutinize the wording with a confining intent, but should seek for the purpose and spirit of the enactment. *United States v. Russell-Taylor, Inc.*, 64 F. Supp. 748-752.

It would not be amiss, in this connection, to call attention to Sec. 133y-5 of the Reorganization Act of 1942 (5 U.S.C.A. Sec. 133y et seq) in which "agency" is defined as meaning "any executive department, commission, independent establishment, corporation \* \* \* board, bureau, division, service, office, officer, authority, administration, or other establishment, in the executive branch of the Government. Such term does not include the Comptroller General of the United States or the General Account-

ing Office, which are part of the legislative branch of the Government.” That clearly indicates that the agencies mentioned, which are charged with regulatory functions, are executive agencies and a part of the executive branch of the government.

Part III of the Second War Powers Act of 1942 became effective March 27, 1942, and is found in 50 U.S. App. Sec. 633, but would seem to have no application to the present dispute.

Section 201 (b) of the Emergency Price Control Act of 1942 became effective January 30, 1942, and is found in 50 U.S.C.A. App. Sec. 921. By that section, the President is authorized to transfer any of the powers and functions conferred by the Act upon the Office of Price Administration “with respect to a particular commodity or commodities to any other department or agency of the Government having other functions relating to such commodity or commodities” except powers or functions conferred by law upon the Secretary of Agriculture, or with respect to any agricultural commodity (which distilled spirits is not, *Dowling Bros. Distilling Co. v. United States*, 153 F. (2) 353), except powers and functions relating to priorities and rationing.

As to this, it is urged that no authority is conferred except to transfer functions to another agency which already has functions relating to a particular commodity then administered by the Price Administrator.

The construction sought to be placed seems inadmissible. Simultaneously with the transfer of functions of the Temporary Controls Administrator, there was created the Office of Temporary Controls

to take over the functions of the OPA and other agencies. There was thus an "agency of the Government having other functions relating to such commodity." And the new agency is a part of the Office for Emergency Management of the President, established pursuant to the Reorganization Act of 1939 (5 U.S.C., Sec. 133 et seq.; particularly Sec. 133s effectuating Plan I following Sec. 133t) and responsible for over-all direction of price control, certainly a function relating to commodities. See Ex. Order 8248,-I, September 8, 1939, Code of Fed. Regulations, Cum. Suppl. Title 1-3, page 576; Administrative Order May 25, 1940; *id.* page 1320; Ex. Order 9250, of Oct. 3, 1942, *id.*; page 1213.

Section 2 of the Stabilization Act of 1942, effective October 2, 1942, may be found in 50 U.S.C.A. App. Sec. 962. It does not seem to have any application to the situation here presented.

It is next asserted that Fleming cannot be the successor of Porter because under Sec. 201(a) of the Emergency Price Control Act of 1942 (50 U.S.C.A. App. Sec. 921(a)), the Price Administrator can only be appointed by the President "with the advice and consent of the Senate"; and Fleming's appointment has never been confirmed by the Senate; citing *Porter v. Hirahara* and *Porter v. Ryan*, *supra*.

By that section the Office of Price Administration is created, to be under the direction of a Price Administrator, "appointed by the President, by and with the advice and consent of the Senate." But as shown before, any of the powers and functions con-

ferred upon the Office of Price Administration with respect to a commodity or commodities may be transferred by the President "to any other department or agency of the Government having other functions relating to such commodity or commodities."

No statute is mentioned that the appointment of Fleming as Temporary Control Administrator must be confirmed by the Senate. He has not been appointed Administrator of the Office of Price Administration. He is not appointed Administrator solely of OPA functions; his duties comprehend much more. And the agency of which he has been appointed Administrator has "other functions relating to such commodity or commodities" as described above. This sentence does not refer solely to existing departments or agencies, nor limit the power to transfer to them. It was undoubtedly contemplated that changing conditions would require or suggest a shifting or consolidation of functions, and this was to be permitted except with reference to certain powers or functions of the Secretary of Agriculture.

Certainly Mr. Fleming, as Administrator, can bring action now for violation of the regulations of OPA by over ceiling sales, were such action not otherwise barred. If he can sue, he can be substituted in a pending action.

If the President had usurped legislative power by Executive Order 9809, Congress would certainly have known it and remonstrated. But, to the contrary, after Mr. Fleming's appointment, he testified

before the House sub-committee on Appropriations on the Presidential request for a deficiency appropriation, and there was no objection either then or in the subsequent bill passed by the Senate on March 5, 1947, and now Public Law 20, 80th Cong., 1st Session, which specifically refers to the transfer of the functions of OPA to the Office of Temporary Controls by Executive Order 9809, and thus, I think, ratifies the President's action. *Isbrandtsen-Moller Co. v. United States*, 300 U. S. 139. 147; *Swayne & Hoyt, Ltd. vs. United States*, id. 297, 301.

Reading section 921 (b) of the Emergency Price Control Act with section 601 of the First War Powers Act, as I think they must be, I can see no valid objection to Mr. Fleming acting as Temporary Control Administrator in the maintenance and further prosecution of this action, as the President directs in paragraph 2 of Executive Order 9809.

Even the termination of the Emergency Price Control Act would not abate rights vested or liabilities incurred prior thereto. Sec. 901.

Finally, it is asserted that because the OPA has not been abolished, no one can be designated to continue pending suits by other than Congress, it has not acted in that respect, or authorized the President to take its place by designating a new agency for that purpose; and Executive Order No. 9809, is attempting to accomplish that result is invalid.

The argument here is substantially a reiteration of that previously referred to. If my answer is sound, that the President acted within his powers in erecting the Office of Temporary Controls, with



Mr. Fleming as Administrator, there does not seem to be any objection to conferring upon such Administrator, who is to exercise the consolidated functions of the several agencies, the power to continue pending litigation.”

And this court concluded “In doing this simple thing, the Constitution has not been validated or weakened. Congress has not been by-passed, the law is still enforced and the violator is held to answer.”

Regardless of the status of this question heretofore, any question or any doubt raised by the decisions of the District Courts of Oregon or Hawaii or the Municipal Court of Long Beach would seem to be resolved by the decision of Justice Douglas of the Supreme Court in *Fleming v. Mohawk Wrecking Company*, No. 583, which the plaintiff respectfully submits, is binding on this Court. This case was on appeal before the Supreme Court at the time of Administrator Porter’s resignation. On Motion of the Acting Solicitor General a Motion for Substitution of Fleming was allowed. Thereafter the defendant filed a Motion to vacate the order substituting Fleming, which was briefed and argued at length before that Court. The Court first reviewed the history of the Emergency Price Control Act as enacted in 1946, the subsequent decontrol of most of the commodities controlled thereby, and the creation of the Office of Temporary Controls by Executive Order in December, 1946, and discussing the objections as raised by the defendant in the following language:

“It is argued that the President had no authority to transfer the functions of the Price Administrator to another agency and to vest in an officer appointed by the President the power which the Emergency Price Control Act, Sec. 201, had conferred upon an Administrator appointed by the President by and with the advice and consent of the Senate, and it is said that even though such authority existed, it came to an end with the cessation of hostilities.

By Sec. 1 of the First War Powers Act of 1941, 55 Stat. 838, 50 U.S.C.A. App. Supp. v. Sec. 601, the President is

“authorized to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, governmental corporation, office, or officer, in such manner as in his judgment shall seem best fitted to carry out the purposes of this title, and to this end is authorized to make such regulations and to issue such orders as he may deem necessary\* \* \*.”

That power may be exercised “only in matters relating to the conduct of the present war.” Sec. 1, and expires six months after “the termination of the war.” Sec. 401.

On December 31, 1946, after the creation of the Office of Temporary Controls, the President, while recognizing that “a state of war still exists,” by

proclamation declared that hostilities had terminated. The cessation of hostilities does not necessarily end the war power. It was stated in *Hamilton v. Kentucky Distilleries & W. Co.*, 251 U.S. 146, 161, that the war power includes the power "to remedy the evils which have arisen from its rise and progress" and continues during that emergency. *Stewart v. Kahn*, 11 Wall. 493, 507. Whatever may be the reach of that power, it is plainly adequate to deal with problems of law enforcement which arise during the period of hostilities but do not cease with them. No more is involved here.

Section 1 of the First War Powers Act does not explicitly provide for creation of a new agency which consolidates the functions and powers previously exercised by one or more other agencies. But the Act has been repeatedly construed by the President to confer such authority. Such construction by the Chief Executive, being both contemporaneous and consistent, is entitled to great weight. See *United States v. Jackson*, 280 U.S. 183, 193; *Billings v. Truesdell*, 321 U.S. 542, 552-553, and the appropriation by Congress of funds for the use of such agencies stands as confirmation and ratification of the action of the Chief Executive. *Brooks v. Dewar*, 313 U.S. 354, 361.

Nor do we think there is merit in the contention that the First War Powers Act gave the President authority to transfer functions only from agencies in existence when that Act became law. It is true that Sec. 1 authorizes the President "to make such

redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon" any agency. But the latter clause is only an illustration of the authority granted, not a limitation on it. It makes clear that the authority extends to existing agencies as well as to others. That construction is supported by Sec. 5 of the Act which states that upon its termination all executive and administrative agencies "shall exercise the same functions, duties, and powers as heretofore or as hereafter by law may be provided, any authorization of the President under this title to the contrary notwithstanding." As stated by the Emergency Court of Appeals, unless Sec. 1 authorizes the President to redistribute functions of agencies created after the passage of the Act, the reference in Sec. 5 to functions "hereafter" provided by law is "Wholly meaningless." *California Lima Bean Growers Ass'n. v. Bowles*. 150 F. 2d 964, 967. Nor is that result affected by the subsequent enactment of the Emergency Price Control Act which in Sec. 201 (b) authorized the President to transfer any of the powers and functions of the Office of Price Administration "with respect to a particular commodity or commodities" to any government agency having other functions relating to such commodities. Whatever effect that provision may have, it does not purport to deal with general enforcement functions and so restricts in no way the authority of the President under the First War Powers Act to trans-

fer them. Yet enforcement functions are all that are involved in the present cases.

We need not decide whether under the First War Powers Act the President had authority to transfer functions of an officer who need be confirmed by the Senate to one appointed by the President without Senate confirmation. For Sec. 2 of the Act provides:

“That in carrying out the purposes of this title, the President is authorized to utilize, coordinate, or consolidate any executive or administrative commissions, bureaus, agencies, governmental corporations, offices, or officers now existing by law, to transfer any duties or powers from one existing department, commission, bureau, agency, governmental corporation, office, or officer to another, to transfer the personnel thereof or any part of it either by detail or assignment, together with the whole or any part of the records and public property belonging thereto.”

The authority to “utilize \* \* \* offices, or officers now existing by law” is sufficient to sustain the transfer of functions under the Executive Order from Porter, resigned, to Fleming. For prior to the Act, Fleming had been appointed from the President and confirmed by the Senate as Federal Works Administrator. He thus was the incumbent of an office “existing by law” at the time of the passage of the Act and by virtue of Sec. 2 could be the lawful recipient through transfer by the President of the functions of other agencies as well. To hold that an officer, previously confirmed by the Senate, must

be once more confirmed in order to exercise the powers transferred to him by the President would be quite inconsistent with the broad grant of power given the President by the First War Powers Act. Any doubts on this score would, moreover, be removed by the recognition by Congress in a recent appropriation of the status of the Temporary Controls Administrator. That recognition was an acceptance or ratification by Congress of the President's action in Executive Order No. 9809. *Swayne & Hoyt, Ltd. v. United States*, 300 U.S. 297, 301-302; *Brooks v. Dewar*, *supra*."

It might be remarked that this decision of the United States Supreme Court as written by Justice Douglas as regards to this point was the unanimous decision of the Court.

Respectfully submitted,

/s/ C. E. KNOWLTON, JR.,

/s/ JOHN E. HEDRICK,

Of Attorneys for Plaintiff.

[Endorsed]: Filed May 17, 1947.

No. Civil 3429

PHILIP B. FLEMING, Administrator Office of  
Temporary Controls,

Plaintiff,

vs.

DOROTHY F. BORDERS,

Defendant.

ORDER CONTINUING HEARING ON  
MOTION TO DISMISS

Now at this day It Is Ordered that the hearing  
on the motion of the plaintiff to vacate judgment  
and reinstate this cause on the docket of this court  
be and it is hereby continued for future hearing.

May 22, 1947.

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[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Philip B. Fleming,  
Administrator of the Office of Temporary Controls,  
the plaintiff named above, hereby appeals to the Cir-  
cuit Court of Appeals for the Ninth Circuit, from  
the Order dismissing plaintiff's Complaint entered  
in this action March 6, 1947.

/s/ JOHN E. HEDRICK,

/s/ CHARLES E. KNOWLTON, Jr.,

Attorneys for Plaintiff.

[Endorsed]: Filed June 5, 1947.

[Title of Cause.]

DOCKET ENTRIES

1947

- Jan. 28 Filed complaint for injunction and treble damages.
- Jan. 28 Issued summons—to Marshal.
- Feb. 4 Filed summons with Marshal's return.
- Feb. 21 Filed motion to dismiss.
- Mar. 6 Entered order dismissing for want of prosecution.
- May 17 Filed motion to vacate judgment and reinstate case on docket.
- May 17 Filed statement of points in support of above motion.
- May 22 Entered order continuing motion to vacate judgment for future setting.
- June 5 Filed notice of appeal by plaintiff.
- June 5 Filed designation of record.

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In the District Court of the United States  
for the District of Oregon

United States of America,  
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 24, inclusive, constitute the transcript of record on appeal from a judgment of said court in a cause therein numbered Civil 3429, in which Philip B. Fleming, Administrator, Office of Temporary Controls, is plaintiff and appellant, and Dorothy



F. Borders is defendant and appellee; that the said transcript has been prepared by me in accordance with the designation of the contents of the record on appeal filed by the appellant, and in accordance with the rules of this court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation as the same appears of record and on file at my office and in my custody.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 26th day of June, 1947.

[Seal]                LOWELL MUNDORFF,  
Clerk.

By /s/ F. L. BUCK,  
Chief Deputy.

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[Endorsed]: No. 11670. United States Circuit Court of Appeals for the Ninth Circuit. Frank R. Creedon, Housing Expediter, Appellant, vs. Dorothy F. Borders, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed June 28, 1947.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.



No. 11672

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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FRANK R. CREEDON, Housing Expediter,  
Appellant,  
vs.

MRS. A. C. SHALBERG,  
Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the District of Oregon

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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

SYLVANUS SMITH,

Commercial Iron Works;

VICTOR E. HARR,

Assistant United States Attorney,

U. S. Court House, Portland, Oregon;

C. E. KNOWLTON, JR., and

JOHN E. HEDRICK,

3312 White Building,

Seattle 1, Washington,

For Appellant.

No record of attorney for Appellee.

In the District Court of the United States  
for the District of Oregon

No. Civil 3430

PHILIP B. FLEMING, Administrator Office of  
Temporary Controls,

Plaintiff,

vs.

MRS. A. C. SHALBERG,

Defendant.

### COMPLAINT

[Complaint for Injunction and Treble Damages is similar to the same as set out in companion cause No. 11670 on pages 4 to 9.]

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[Title of District Court and Cause.]

### ORDER OF DISMISSAL

Now at this day It Is Ordered that this cause be and it is hereby dismissed for want of jurisdiction.

March 6, 1947.

---

[Title of District Court and Cause.]

### MOTION TO VACATE JUDGMENT AND REINSTATE CASE ON THE DOCKET

Comes Now the above plaintiff and respectfully moves the Court to vacate the judgment and dismissal entered in the above case and to reinstate the case on the docket.

In support of this Motion plaintiff attaches hereto and hereby makes a part hereof the attached Statement of Points and Authorities.

Dated this 16th day of May, 1947.

/s/ C. E. KNOWLTON, JR.,

/s/ JOHN E. HEDRICK,

Of Attorneys for Plaintiff.

[Endorsed]: Filed May 17, 1947.

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[Statement of Points and Authorities Relied on by the Plaintiff in Support of His Motion to Vacate Judgment of Dismissal and Reinstate Cases on the Docket is similar to the same as set out in companion cause No. 11670 on pages 12 to 28.]

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[Title of District Court and Cause.]

ORDER CONTINUING HEARING ON  
MOTION TO DISMISS

Now at this day It Is Ordered that the hearing on the motion of the plaintiff to vacate judgment and reinstate this cause on the docket of this court be and it is hereby continued for future hearing.

May 22, 1947.

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that Philip B. Fleming, Administrator of the Office of Temporary Controls, the plaintiff named above, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the Order dismissing plaintiff's Complaint entered in this action on March 6, 1947.

/s/ JOHN E. HEDRICK,

/s/ CHARLES E. KNOWLTON,

JR.,

Attorneys for Plaintiff.

[Endorsed]: Filed June 5, 1947.

---

[Title of District Court and Cause.]

### DOCKET ENTRIES

1947

- Jan. 28 Filed complaint for injunction and treble damages.
- Jan. 28 Issued summons—to Marshal.
- Mar. 6 Entered order dismissing for want of jurisdiction.
- Apr. 3 Filed summons—returned unexecuted.
- May 17 Filed motion to vacate judgment and reinstate case on the docket.
- May 17 Filed statement of points in support of above motion.
- May 22 Entered order continuing motion to vacate judgment for future setting.
- June 5 Filed notice of appeal by plaintiff.
- June 5 Filed designation of record on appeal.



In the District Court of the United States  
for the District of Oregon

United States of America,  
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 21, inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause therein numbered Civil 3430, in which Philip B. Fleming, Administrator, Office of Temporary Controls, is plaintiff and appellant, and Mrs. A. C. Shalberg is defendant and appellee; that said transcript has been prepared by me in accordance with the designation of record on appeal filed by the appellant and in accordance with the rules of court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation as the same appears of record and on file at my office and in my custody.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 27th day of June, 1947.

[Seal]            LOWELL MUNDORFF,  
Clerk.

By /s/ F. L. BUCK,  
Chief Deputy.

[Endorsed]: No. 11672. United States Circuit Court of Appeals for the Ninth Circuit. Frank R. Creedon, Housing Expediter, Appellant, vs. Mrs. A. C. Shalberg, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed June 30, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

No. 11673

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United States  
Circuit Court of Appeals  
For the Ninth Circuit

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FRANK R. CREEDON, Housing Expediter,  
Appellant,

vs.

MRS. RICHARD DAVIS,  
Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the District of Oregon

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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

SYLVANUS SMITH,

c/o Commercial Iron Works;

VICTOR E. HARR,

Assistant United States Attorney,

U. S. Court House, Portland, Oregon;

C. E. KNOWLTON, Jr., and

JOHN E. HEDRICK,

3312 White Building, Seattle 1, Washington,

For Appellant.

No record of attorney for Appellee.

In the District Court of the United States  
for the District of Oregon

No. Civil 3431

PHILIP B. FLEMING, Administrator, Office of  
Temporary Controls,

Plaintiff,

vs.

MRS. RICHARD DAVIS,

Defendant.

### COMPLAINT

[Complaint for Injunction and Treble Damages is similar to the same as set out in companion cause No. 11670 on pages 4 to 9.]

11 x 1 1/2

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[Title of District Court and Cause.]

### ORDER OF DISMISSAL

Now at this day It Is Ordered that this cause be  
and it is hereby dismissed for want of jurisdiction.

March 6, 1947.

[Title of District Court and Cause.]

MOTION TO VACATE JUDGMENT AND  
REINSTATE CASE ON THE DOCKET

Comes Now the plaintiff above named and respectfully moves the Court to vacate the judgment and dismissal entered in the above case and to reinstate the case on the docket.

In support of this Motion plaintiff attaches hereto and hereby makes a part hereof the attached Statement of Points and Authorities.

Dated this 16th day of May, 1947.

/s/ C. E. KNOWLTON, JR.,

/s/ JOHN E. HEDRICK,

Of Attorneys for Plaintiff.

[Endorsed]: Filed May 17, 1947.

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[Statement of Points and Authorities Relied on by the Plaintiff in Support of His Motion to Vacate Judgment of Dismissal and Reinstate Cases on the Docket is similar to the same as set out in companion cause No. 11670 on pages 12 to 28.]

[Title of District Court and Cause.]

ORDER CONTINUING HEARING ON  
MOTION TO DISMISS

Now at this day It Is Ordered that the hearing on the motion of the plaintiff to vacate judgment and reinstate this cause on the docket of this court be and it is hereby continued for future hearing.

May 22, 1947.

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[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Philip B. Fleming, Administrator of the Office of Temporary Controls, the plaintiff named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the Order dismissing plaintiff's Complaint entered on March 6, 1947.

/s/ JOHN E. HEDRICK,

/s/ CHARLES E. KNOWLTON,  
JR.,

Attorneys for Plaintiff.

[Endorsed]: Filed June 5, 1947.



[Title of District Court and Cause.]

DOCKET ENTRIES

1947

- Jan. 28 Filed complaint for injunction and treble damages.
- Jan. 28 Issued summons—to Marshal.
- Mar. 6 Filed summons.
- Mar. 6 Entered order dismissing for want of jurisdiction.
- May 17 Filed motion to vacate judgment and reinstate case on the docket.
- May 17 Filed statement of points in support of above motion.
- May 22 Entered order continuing motion to vacate judgment for future setting.
- June 5 Filed notice of appeal by plaintiff.
- June 5 Filed designation of record on appeal.

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In the District Court of the United States  
for the District of Oregon

United States of America,  
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 21, inclusive, constitute the transcript of record upon appeal from a judgment of said court in a cause therein numbered Civil 3431, in which Philip B. Fleming, Administrator, Office of Tempo-

rary Controls, is plaintiff and appellant, and Mrs. Richard Davis is defendant and appellee; that said transcript has been prepared by me in accordance with the designation of record on appeal filed by the appellant and in accordance with the rules of court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation as the same appears of record and on file at my office and in my custody.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 27th day of June, 1947.

[Seal]                      LOWELL MUNDORFF,  
Clerk.

By /s/ F. L. BUCK,  
Chief Deputy.

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[Endorsed]: No. 11673. United States Circuit Court of Appeals for the Ninth Circuit. Frank R. Creedon, Housing Expediter, Appellant, vs. Mrs. Richard Davis, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed June 30, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

No. 11674

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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FRANK R. CREEDON, Housing Expediter,  
Appellant,

vs.

ADOLPH NEUBERT,  
Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the District of Oregon

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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

SYLVANUS SMITH,

c/o Commercial Iron Works;

VICTOR E. HARR,

Assistant United States Attorney,

United States Court House, Portland, Oregon;

JOHN E. HEDRICK and

CHARLES E. KNOWLTON, JR.,

3312 White-Henry-Stuart Building,

Seattle 1, Washington,

For Appellant.

No record of Attorney for Appellee.

In the District Court of the United States  
for the District of Oregon

No. Civil 3435

PHILIP B. FLEMING, Administrator Office of  
Temporary Controls,

Plaintiff,

vs.

ADOLPH NEUBERT,

Defendant.

### COMPLAINT

[Complaint for Injunction and Treble Damages is similar to the same as set out in companion cause No. 11670 on pages 4 to 9.]

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[Title of District Court and Cause.]

### ORDER OF DISMISSAL

Now at this day It Is Ordered that this cause be  
and it is hereby dismissed for want of jurisdiction.

March 6, 1947.

[Title of District Court and Cause.]

MOTION TO VACATE JUDGMENT AND  
REINSTATE CASE ON THE DOCKET

Comes Now the above plaintiff and respectfully moves the Court to vacate the judgment and dismissal entered in the above case and to reinstate the case on the docket.

In support of this Motion plaintiff attaches hereto and hereby makes a part hereof the attached Statement of Points and Authorities.

Dated this 16th day of May, 1947.

/s/ C. E. KNOWLTON, JR.,

/s/ JOHN E. HEDRICK,

Of Attorneys for Plaintiff.

[Endorsed]: Filed May 17, 1947.

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[Statement of Points and Authorities Relied on by the Plaintiff in Support of His Motion to Vacate Judgment of Dismissal and Reinstate Cases on the Docket is similar to the same as set out in companion cause No. 11670 on pages 12 to 28.]

[Title of District Court and Cause.]

ORDER CONTINUING HEARING ON  
MOTION TO DISMISS

Now at this day It Is Ordered that the hearing on the motion of the plaintiff to vacate judgment and reinstate this cause on the docket of this court be and it is hereby continued for future hearing.

May 22, 1947.

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[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Philip B. Fleming, Administrator of the Office of Temporary Controls, the plaintiff named above, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the Order dismissing plaintiff's Complaint entered in this action on March 6, 1947.

/s/ JOHN E. HEDRICK,

/s/ CHARLES E. KNOWLTON,  
JR.,

Attorneys for Plaintiff.

[Endorsed]: Filed June 5, 1947.



[Title of District Court and Cause.]

DOCKET ENTRIES

1947

- Jan. 28 Filed complaint for injunction and treble damages.
- Jan. 28 Issued summons—to Marshal.
- Feb. 28 Filed summons with Marshal's return.
- Mar. 6 Entered order dismissing for want of jurisdiction.
- May 17 Filed motion to vacate judgment and reinstate case on the docket.
- May 17 Filed statement of points in support of above motion.
- May 22 Entered order continuing motion to vacate judgment for future setting.
- June 5 Filed notice of appeal by plaintiff.
- June 5 Filed designation of record on appeal.

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In the District Court of the United States  
for the District of Oregon

United States of America,  
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 21, inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause therein numbered Civil 3435, in which Philip B. Fleming, Administrator, Office of

Temporary Controls, is plaintiff and appellant, and Adolph Neubert is defendant and appellee; that said transcript has been prepared by me in accordance with the designation of record on appeal filed by the appellant and in accordance with the rules of court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation as the same appears of record and on file at my office and in my custody.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 27th day of June, 1947.

[Seal]                      LOWELL MUNDORFF,  
Clerk.

By /s/ F. L. BUCK,  
Chief Deputy.

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[Endorsed]: No. 11674. United States Circuit Court of Appeals for the Ninth Circuit. Frank R. Creedon, Housing Expediter, Appellant, vs. Adolph Neubert, Appellee Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed June 30, 1947.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

No. 11675

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United States  
Circuit Court of Appeals  
For the Ninth Circuit

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FRANK R. CREEDON, Housing Expediter,  
Appellant,

vs.

L. R. CHAMBERS,  
Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the District of Oregon

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**NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD**

**SYLVANUS SMITH,**  
c/o Commercial Iron Works;

**J. ROBERT PATTERSON,**  
Assistant United States Attorney,  
U. S. Court House, Portland, Oregon;

**C. E. KNOWLTON, JR., and**

**JOHN E. HEDRICK,**  
3312 White Building,  
Seattle 1, Washington,

**For Appellant.**

**No record of Attorney for Appellee.**

In the District Court of the United States  
for the District of Oregon

No. Civil 3462

PHILIP B. FLEMING, Administrator Office of  
Temporary Controls,

Plaintiff,

vs.

L. R. CHAMBERS,

Defendant.

### COMPLAINT

[Complaint for Injunction and Treble Damages is similar to the same as set out in companion cause No. 11670 on pages 4 to 9.]

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[Title of District Court and Cause.]

### ORDER OF DISMISSAL

Now at this day It Is Ordered that this cause be  
and it is hereby dismissed for want of jurisdiction.  
March 6, 1947.

[Title of District Court and Cause.]

MOTION TO VACATE JUDGMENT AND  
REINSTATE CASE ON THE DOCKET

Comes Now the above plaintiff and respectfully moves the Court to vacate the judgment and dismissal entered in the above case and to reinstate the case on the docket.

In support of this Motion plaintiff attaches hereto and hereby makes a part hereof the attached Statement of Points and Authorities.

Dated this 16th day of May, 1947.

/s/ C. E. KNOWLTON, JR.,

/s/ JOHN E. HEDRICK,

Of Attorneys for Plaintiff.

[Endorsed]: Filed May 17, 1947.

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[Statement of Points and Authorities Relied on by the Plaintiff in Support of His Motion to Vacate Judgment of Dismissal and Reinstate Cases on the Docket is similar to the same as set out in companion cause No. 11670 on pages 12 to 28.]

[Title of District Court and Cause.]

ORDER CONTINUING HEARING ON  
MOTION TO DISMISS

Now at this day It Is Ordered that the hearing on the motion of the plaintiff to vacate judgment and reinstate this cause on the docket of this court be and it is hereby continued for future hearing.

May 22, 1947.

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[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Philip B. Fleming, Administrator, of Office of Temporary Controls, the plaintiff named above, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the Order dismissing plaintiff's Complaint entered in this action on March 6, 1947.

/s/ JOHN E. HEDRICK,

/s/ CHARLES E. KNOWLTON,  
JR.

[Endorsed]: Filed June 5, 1947.



[Title of District Court and Cause.]

DOCKET ENTRIES

1947

- Feb. 12 Filed complaint for injunction and for treble damages.
- Feb. 12 Issued summons—to Marshal.
- Mar. 6 Entered order dismissing for want of jurisdiction.
- Mar. 20 Filed summons—returned unserved.
- May 17 Filed motion to vacate judgment and reinstate case on the docket.
- May 17 Filed statement of points in support of above motion.
- May 22 Entering order continuing motion to vacate judgment for future setting.
- June 5 Filed notice of appeal by plaintiff.
- June 5 Filed designation of record on appeal.

---

In the District Court of the United States  
for the District of Oregon

United States of America,  
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 22, inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause therein numbered Civil 3462, in which Philip B. Fleming, Administrator, Office of

Temporary Controls, is plaintiff and appellant, and L. R. Chambers is defendant and appellee; that said transcript has been prepared by me in accordance with the designation of record on appeal filed by the appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation as the same appears of record and on file at my office and in my custody.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 27th day of June, 1947.

[Seal]                      LOWELL MUNDORFF,  
Clerk.

By /s/ F. L. BUCK,  
Chief Deputy.

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[Endorsed]: No. 11675. United States Circuit Court of Appeals for the Ninth Circuit. Frank R. Creedon, Housing Expediter, Appellant, vs. L. R. Chambers, Appellee. Transcript of Record. Upon Appeal for the District Court of the United States for the District of Oregon.

Filed June 30, 1947.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

No. 11676

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United States  
Circuit Court of Appeals  
For the Ninth Circuit

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FRANK R. CREEDON, Housing Expediter,  
Appellant,

vs.

GEORGE ROUSE,  
Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the District of Oregon

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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

SYLVANUS SMITH,  
c/o Commercial Iron Works;

J. ROBERT PATTERSON,  
Assistant United States Attorney,  
U. S. Court House, Portland, Oregon;

C. E. KNOWLTON, JR., and

JOHN E. HEDRICK,  
3312 White Building,  
Seattle 1, Washington,  
For Appellant.

REUBEN G. LENSKE,  
American Legion Building,  
Portland, Oregon,  
For Appellee.

In the District Court of the United States  
for the District of Oregon

No. Civil 3463

PHILIP B. FLEMING, Administrator Office of  
Temporary Controls,

Plaintiff,

vs.

GEORGE ROUSE,

Defendant.

### COMPLAINT

[Complaint for Injunction and Treble Damages is similar to the same as set out in companion cause No. 11670 on pages 4 to 9.]

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[Title of District Court and Cause.]

### ORDER OF DISMISSAL

Now at this day It Is Ordered that this cause be and it is hereby dismissed for want of jurisdiction.

March 6, 1947.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now defendant and moves the court for an order dismissing the above-entitled suit.

In the event the above motion is denied, defendant moves that plaintiff set forth in said complaint the period that they claim the alleged violations occurred.

/s/ REUBEN G. LENSKE,

Attorney for Defendant,  
American Legion Bldg.

Among the grounds for dismissal, defendant will stress that the plaintiff has no right to bring said cause.

Service of the above motion accepted this 26th day of March, 1947.

/s/ VICTOR E. HARR,

Assistant U. S. Attorney.

I certify that on March 26th, 1947, I served the Office of Temporary Controls, OPA, with the within Motion by their attorney, Sylvanus Smith, in that I deposited a copy of the within Motion with the office of the U. S. Attorney with the understanding that it would be forwarded to Mr. Smith.

/s/ S. I. SPIEGEL.

[Endorsed]: Filed March 27, 1947.

[Title of District Court and Cause.]

MOTION TO VACATE JUDGMENT AND  
REINSTATE CASE ON THE DOCKET

Comes Now the plaintiff above named and respectfully moves the Court to vacate the judgment and dismissal entered in the above case and to reinstate the case on the docket.

In support of this Motion plaintiff attaches hereto and hereby makes a part hereof the attached Statement of Points and Authorities.

Dated this 16th day of May, 1947.

/s/ C. E. KNOWLTON, JR.,

/s/ JOHN E. HEDRICK,

Of Attorneys for Plaintiff.

[Endorsed]: Filed May 17, 1947.

---

[Statement of Points and Authorities Relied on by the Plaintiff in Support of His Motion to Vacate Judgment of Dismissal and Reinstate Cases on the Docket is similar to the same as set out in companion cause No. 11670 on pages 12 to 28.]



[Title of District Court and Cause.]

ORDER CONTINUING HEARING ON  
MOTION TO DISMISS

Now at this day It Is Ordered that the hearing on the motion of the plaintiff to vacate judgment and reinstate this cause on the docket of this court be and it is hereby continued for future hearing.

May 22, 1947.

---

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Philip B. Fleming, Administrator of the Office of Temporary Controls, the plaintiff named above, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the Order dismissing plaintiff's Complaint entered in this action on March 6, 1947.

/s/ JOHN E. HEDRICK,

/s/ CHARLES E. KNOWLTON,  
JR.,

Attorneys for Plaintiff.

[Endorsed]: Filed June 5, 1947.

[Title of District Court and Cause.]

DOCKET ENTRIES

1947

- Feb. 12 Filed complaint for injunction and for treble damages.
- Feb. 12 Issued summons—to Marshal.
- Mar. 6 Entered order dismissing for want of jurisdiction.
- Mar. 6 Filed summons with Marshal's return.
- Mar. 27 Filed defendant's motion for order of dismissal.
- May 17 Filed motion to vacate judgment and reinstate case on the docket.
- May 17 Filed statement of points in support of above motion.
- May 22 Entered order continuing motion to vacate judgment for future setting.
- June 5 Filed notice of appeal by plaintiff.
- June 5 Filed designation of record on appeal.

---

In the District Court of the United States  
for the District of Oregon

United States of America,  
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 22, inclusive, constitute the transcript of record upon the appeal from a judgment of said

court in a cause therein numbered Civil 3463, in which Philip B. Fleming, Administrator, Office of Temporary Controls, is plaintiff and appellant, and George Rouse is defendant and appellee; that said transcript has been prepared by me in accordance with the designation of record on appeal filed by the appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation as the same appears of record and on file at my office and in my custody.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 27th day of June, 1947.

[Seal]                      LOWELL MUNDORFF,  
Clerk.

By /s/ F. L. BUCK,  
Chief Deputy.

---

[Endorsed]: No. 11676. United States Circuit Court of Appeals for the Ninth Circuit. Frank R. Creedon, Housing Expediter, Appellant, vs. George Rouse, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed June 30, 1947.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.



No. 11677

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

FRANK R. CREEDON, Housing Expediter,  
Appellant,

vs.

HERMAN HAGE and EDWARD C. HAGE,  
Appellees.

---

Transcript of Record

---

Upon Appeal from the District Court of the United States  
for the District of Oregon

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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

SYLVANUS SMITH,

c/o Commercial Iron Works;

J. ROBERT PATTERSON,

Assistant United States Attorney,

U. S. Court House, Portland, Oregon;

EDWARD B. TWINING,

Assistant United States Attorney,

U. S. Court House, Portland, Oregon;

C. E. KNOWLTON, JR., and

JOHN E. HEDRICK,

3312 White Building,

Seattle 1, Washington,

For Appellant.

E. B. McCUTCHAN,

1212 Failing Building,

Portland, Oregon,

For Appellees.

In the District Court of the United States  
for the District of Oregon  
Civil Action File No. 3464

PHILIP B. FLEMING, Administrator, Office of  
Temporary Controls,

Plaintiff,

vs.

HERMAN HAGE and EDWARD C. HAGE,  
Defendants.

### COMPLAINT

[Complaint for Injunction and Treble Dam-  
ages is similar to the same as set out in com-  
panion cause No. 11670 on pages 4 to 9.]

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[Title of District Court and Cause.]

### STIPULATION

It is hereby stipulated by and between J. Robert Patterson, Assistant United States Attorney, of attorneys for plaintiff, and E. B. McCutchan, attorney for defendants, that defendants shall have an extension of time in which to answer or otherwise plead to plaintiff's Complaint until the 1st day of April, 1947.



Dated at Portland, Oregon, this 6th day of March, 1947.

/s/ E. B. TWINING,  
Of Attorneys for Plaintiff.

/s/ E. B. McCUTCHAN,  
Attorney for Defendants.

[Endorsed]: Filed March 6, 1947.

---

[Title of District Court and Cause.]

ORDER OF DISMISSAL

Now at this day It Is Ordered that this cause be and it is hereby dismissed for want of jurisdiction.  
March 6, 1947.

---

[Title of District Court and Cause.]

MOTION TO VACATE JUDGMENT AND  
REINSTATE CASE ON THE DOCKET

Comes Now the above plaintiff and respectfully moves the Court to vacate the judgment and dismissal entered in the above case and to reinstate the case on the docket.

In support of this Motion plaintiff attaches hereto and hereby makes a part hereof the attached Statement of Points and Authorities.

Dated this 16th day of May, 1947.

/s/ C. E. KNOWLTON, JR.,  
/s/ JOHN E. HEDRICK,  
Of Attorneys for Plaintiff.

[Endorsed]: Filed May 17, 1947.

[Statement of Points and Authorities Relied on by the Plaintiff in Support of His Motion to Vacate Judgment of Dismissal and Reinstate Cases on the Docket is similar to the same as set out in companion cause No. 11670 on pages 12 to 28.]

---

[Title of District Court and Cause.]

ORDER CONTINUING HEARING ON  
MOTION TO DISMISS

Now at this day It Is Ordered that the hearing on the motion of the plaintiff to vacate judgment and reinstate this cause on the docket of this court be and it is hereby continued for future hearing.

May 22, 1947.

---

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Philip B. Fleming, Administrator of the Office of Temporary Controls, the plaintiff named above, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the Order dismissing plaintiff's Complaint entered in this action on March 6, 1947.

/s/ JOHN E. HEDRICK,

/s/ CHARLES E. KNOWLTON.

[Endorsed]: Filed June 5, 1947.

## DOCKET ENTRIES

1947

- Feb. 12 Filed complaint for injunction and for treble damages.
- Feb. 12 Issued summons—to Marshal.
- Feb. 14 Filed summons with Marshal's return.
- Mar. 6 Filed stipulation for extension of time to answer until April 1, 1947.
- Mar. 6 Entered order dismissing for want of jurisdiction.
- May 17 Filed motion to vacate judgment and reinstate case on the docket.
- May 17 Filed statement of points in support of above motion.
- May 22 Entered order continuing motion to vacate judgment for future setting.
- June 5 Filed notice of appeal by plaintiff.
- June 5 Filed designation of record on appeal.

---

In the District Court of the United States  
for the District of Oregon

United States of America,  
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered 1 to 23, inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause therein numbered Civil 3464, in which Philip B. Fleming, Administrator, Office of Temporary Controls, is plaintiff and appellant, and Herman Hage and Edward C. Hage are defendants and ap-

pellees; that said transcript has been prepared by me in accordance with the designation of record on appeal filed by the appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation as the same appears of record and on file at my office and in my custody.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 27th day of June, 1947.

[Seal]                      LOWELL MUNDORFF,  
Clerk.

By /s/ F. L. BUCK,  
Chief Deputy.

---

[Endorsed]: No. 11677. United States Circuit Court of Appeals for the Ninth Circuit. Frank R. Creedon, Housing Expediter, Appellant, vs. Herman Hage and Edward C. Hage, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed June 30, 1947.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

No. 11678

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United States  
Circuit Court of Appeals  
For the Ninth Circuit

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FRANK R. CREEDON, Housing Expediter,  
Appellant,  
vs.

J. H. JEFFERS, doing business as NORBLAD  
HOTEL,  
Appellee.

---

Transcript of Record

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Upon Appeal from the District Court of the United States  
for the District of Oregon

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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

SYLVANUS SMITH,  
c/o Commercial Iron Works;

J. ROBERT PATTERSON,  
Assistant United States Attorney,  
U. S. Court House, Portland, Oregon;

C. E. KNOWLTON, JR., and

JOHN E. HEDRICK,  
3312 White Building, Seattle 1, Washington,  
For Appellant.

No record of attorney for Appellee.

In the District Court of the United States  
for the District of Oregon

No. Civil 3465

PHILIP B. FLEMING, Administrator, Office of  
Temporary Controls,

Plaintiff,

vs.

J. H. JEFFERS, doing business as NORBLAD  
HOTEL,

Defendant.

### COMPLAINT

[Complaint for Injunction and Treble Dam-  
ages is similar to the same as set out in com-  
panion cause No. 11670 on pages 4 to 9.]

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[Title of District Court and Cause.]

### ORDER OF DISMISSAL

Now at this day It Is Ordered that this cause be  
and it is hereby dismissed for want of jurisdiction.

March 6, 1947.

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[Title of District Court and Cause.]

### MOTION TO VACATE JUDGMENT AND REINSTATE CASE ON THE DOCKET

Comes Now the above plaintiff and respectfully  
moves the Court to vacate the judgment and dis-



missal entered in the above case and to reinstate the case on the docket.

In support of this Motion plaintiff attaches hereto and hereby makes a part hereof the attached Statement of Points and Authorities.

Dated this 16th day of May, 1947.

/s/ C. E. KNOWLTON, JR.,

/s/ JOHN E. HEDRICK,

Of Attorneys for Plaintiff.

[Endorsed]: Filed May 17, 1947.

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[Statement of Points and Authorities Relied on by the Plaintiff in Support of His Motion to Vacate Judgment of Dismissal and Reinstate Cases on the Docket is similar to the same as set out in companion cause No. 11670 on pages 12 to 28.]

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[Title of District Court and Cause.]

**ORDER CONTINUING HEARING ON  
MOTION TO DISMISS**

Now at this day It Is Ordered that the hearing on the motion of the plaintiff to vacate judgment and reinstate this cause on the docket of this court be and it is hereby continued for future hearing.

May 22, 1947.

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that Philip B. Fleming, Administrator of the Office of Temporary Controls, the plaintiff named above, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the Order dismissing plaintiff's Complaint entered in this action on March 6, 1947.

/s/ JOHN E. HEDRICK,  
/s/ CHARLES E. KNOWLTON, Jr.,  
Attorneys for Plaintiff.

[Endorsed]: Filed June 5, 1947.

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[Title of District Court and Cause.]

### DOCKET ENTRIES

1947

- Feb. 12 Filed complaint for injunction and for treble damages.
- Feb. 12 Issued summons—to Marshal.
- Mar. 6 Filed summons with Marshal's return.
- Mar. 6 Entered order dismissing for want of jurisdiction.
- May 17 Filed motion to vacate judgment and reinstate case on the docket.
- May 17 Filed statement of points in support of above motion.
- May 22 Entered order to continue motion to vacate judgment for future setting.
- June 5 Filed notice of appeal by plaintiff.
- June 5 Filed designation of record on appeal.

In the District Court of the United States  
for the District of Oregon

United States of America,  
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 21, inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause therein numbered Civil 3465, in which Philip B. Fleming, Administrator, Office of Temporary Controls, is plaintiff and appellant, and J. H. Jeffers, doing business as Norblad Hotel, is defendant and appellee; that said transcript has been prepared by me in accordance with the designation of record on appeal filed by the appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation as the same appears of record and on file at my office and in my custody.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 27th day of June, 1947.

[Seal]                      LOWELL MUNDORFF,  
Clerk.

By /s/ F. L. BUCK,  
Deputy Clerk.

[Endorsed]: No. 11678. United States Circuit Court of Appeals for the Ninth Circuit. Frank R. Creedon, Housing Expediter, Appellant, vs. J. H. Jeffers, doing business as Norblad Hotel, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed June 30, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

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# United States Circuit Court of Appeals

For the Ninth Circuit.

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FRANK R. CREEDON, Housing Expediter, Office  
of Housing Expediter,

Appellant,

vs.

DOROTHY F. BORDERS,

No. 11670

MRS. A. C. SHALBERG,

No. 11672

MRS. RICHARD DAVIS,

No. 11673

ADOLPH NEUBERT,

No. 11674

L. R. CHAMBERS,

No. 11675

GEORGE ROUSE,

No. 11676

HERMAN HAGE and EDWARD C. HAGE,

No. 11677

J. H. JEFFERS, d/b/a Norblad Hotel,

No. 11678

Appellees.

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## Transcript of Records

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Upon Appeals from the District Court of the United States  
for the District of Oregon

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PROCEEDINGS HAD IN THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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In the Circuit Court of Appeals of the United States  
for the Ninth Circuit

Nos. 11670, 11672, 11673, 11674, 11675, 11676,  
11677, 11678

STATEMENT OF POINTS

Plaintiff Appellant, Philip B. Fleming, by his attorneys, Charles E. Knowlton, Jr., and John E. Hedrick, designates the following as his statement of points on appeal:

1. The District Court of the United States for the District of Oregon erred in dismissing the action.

2. The District Court of the United States for the District of Oregon erred in holding that plaintiff is not an officer of the United States and authorized by law to sue and is not the true and valid successor of Paul A. Porter, Administrator, Office of Price Administration.

Dated this 16th day of June, 1947.

/s/ CHARLES E. KNOWLTON,  
JR.,

/s/ JOHN E. HEDRICK,

Of Attorneys for Plaintiff.

[Endorsed]: Filed June 28, 1947.

At a Stated Term, to wit: The October Term, 1946, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday, the twenty-fifth day of August, in the year of our Lord one thousand nine hundred and forty-seven.

Present:

Honorable Francis A. Garrecht,  
Senior Circuit Judge, Presiding;

Honorable Albert Lee Stephens,  
Circuit Judge;

Honorable Homer T. Bone,  
Circuit Judge.

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[Title and Causes.]

### ORDER FOR SUBSTITUTION OF PARTY APPELLANT

Upon consideration of the petition of Frank R. Creedon, Housing Expediter, that he be substituted as party appellant herein in the place and stead of Philip B. Fleming, and good cause therefor appearing,

It Is Ordered that said petition be, and hereby is granted, and that Frank R. Creedon, Housing Expediter, be, and he is hereby substituted, as party appellant in each of above causes in the place and



stead of Philip B. Fleming, Administrator, Office of Temporary Controls, and these actions shall hereafter be designated as Frank R. Creedon, Housing Expediter, Office of Housing Expediter, appellant, versus Borders, No. 11670; vs. Mrs. A. C. Shalberg, No. 11672; vs. Mrs. Richard Davis, No. 11673; vs. Adolph Neuberg, No. 11674; vs. L. R. Chambers, No. 11675; vs. George Rouse, No. 11676; vs. Hage, et al., No. 11677, and vs. J. H. Jeffers, etc., No. 11678.

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[Title of Circuit Court of Appeals and Cause.]

ORDER CONCERNING PRINTING OF RECORDS OF EIGHT CASES NOT CONSOLIDATED

Upon application of the appellant and it appearing to the Court that good cause having been shown, therefore it is hereby

Ordered that the record of the above entitled eight cases on this appeal be printed as one record under the title of all causes, and it is further

Ordered that in said record only one complaint be printed under the title of all causes, and it is further

Ordered that only one order of substitution wherein Frank R. Creedon, Housing Expediter, Office of the Housing Expediter, plaintiff, being substituted for Philip B. Fleming, Administrator,

Office of Temporary Controls, be printed under the title of all causes.

Done this 22nd day of September, 1947.

WILLIAM DENMAN,  
U. S. Circuit Judge.

Presented by:

/s/ JOHN E. HEDRICK,  
Attorney for Plaintiff.

[Endorsed]: Order, etc., filed Sept. 22, 1947.

11670-11675

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**In the United States Circuit Court of Appeals  
for the Ninth Circuit**

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**PHILIP B. FLEMING, ADMINISTRATOR, OFFICE OF TEM-  
PORARY CONTROLS, APPELLANT**

*vs.*

**DOROTHY F. BORDERS, No. 11670, MRS. A. C. SHALBERG,  
No. 11672, MRS. RICHARD DAVIS, No. 11673, ADOLPH  
NEUBERT, No. 11674, L. R. CHAMBERS, No. 11675,  
GEORGE ROUSE, No. 11676, HERMAN HAGE AND ED-  
WARD C. HAGE, No. 11677, J. R. JEFFERS, DOING  
BUSINESS AS NORBLAD HOTEL, No. 11678, APPELLEES**

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**APPELLANT'S BRIEF**

---

**ED DUPREE,**  
*Acting General Counsel,*

**HUGO V. PRUCHA,**  
*Chief Litigation Unit,*

**IRVING M. GRUBER,**  
*Chief Appellate Attorney,*

**NATHAN SIEGEL,**  
*Special Appellate Attorney,*

*Attorneys for Frank R. Creedon, Housing Expediter,  
Office of the Housing Expediter,  
Office of the General Counsel,  
Temporary "E" Building, Washington 25, D. C.*

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**FILED**

**NOV 15 1947**



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# **In the United States Circuit Court of Appeals for the Ninth Circuit**

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**PHILIP B. FLEMING, ADMINISTRATOR, OFFICE OF TEM-  
PORARY CONTROLS, APPELLANT**

*vs.*

**DOROTHY F. BORDERS, No. 11670, MRS. A. C. SHALBERG,  
No. 11672, MRS. RICHARD DAVIS, No. 11673, ADOLPH  
NEUBERT, No. 11674, L. R. CHAMBERS, No. 11675,  
GEORGE ROUSE, No. 11676, HERMAN HAGE AND ED-  
WARD C. HAGE, No. 11677, J. R. JEFFERS, DOING  
BUSINESS AS NORBLAD HOTEL, No. 11678, APPELLEES**

---

## **APPELLANT'S BRIEF**

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### **STATEMENT OF JURISDICTION**

The Housing Expeditor appeals from a final judgment of the United States District Court for the District of Oregon entered on March 6, 1947, dismissing certain actions brought in accordance with Sections 205 (a) and (e) of the Emergency Price Control Act of 1942, as amended (56 Stat. 23, 50 U. S. C. App. 901 et seq.) for violations of the Rent Regulation for Housing (10 F. R. 13528) prohibited by Section 4 (a) of said Act. Notice of appeal was filed on June 5, 1947 (R. 29, 38, 46, 54, 62, 71, 80, 88). Jurisdiction of the District Court was invoked under

Sections 205 (a), (c), and (e) of said Act (50 U. S. C. Sections 925 (a), (c), and (e), and the jurisdiction of this Court is invoked under Section 128 of the Judicial Code (28 U. S. C. A 225).

#### STATEMENT OF THE CASE

These actions, which have been consolidated by order of this court dated September 22, 1947 (R. 94-95), were instituted at various times from January 28, 1947 to February 12, 1947 by Philip B. Fleming, Administrator, Office of Temporary Controls in the District Court of the United States for the District of Oregon (R. 4, 36, 44, 52, 60, 68, 78, 86). The complaints all asked for injunctive relief and treble damages because defendants had violated the Rent Regulation. The defendants moved to dismiss these complaints on the grounds that: (a) plaintiff had no legal capacity to sue; (b) the complaint did not state facts sufficient to constitute a suit against the defendants in that plaintiff's cause of action was founded upon the Emergency Price Control Act of 1942, which had expired on June 30, 1946; and (c) the complaint did not state facts sufficient to state a cause of action in that the Emergency Price Control Act of 1942, as amended and extended, is unconstitutional (R. 10, 69).

Judge McColloch ordered that the causes be dismissed "for want of jurisdiction" on March 6, 1947 (R. 11). He made no statement of his reasons for dismissing these actions, but on February 15, 1947, in the similar case of *Fleming v. Findlay*, Civil No. 3437, not reported, he also dismissed the action "on jurisdictional grounds." He stated that:



I am dismissing this case which is one of several that have recently been filed so that the authority of General Fleming can be tested in an appellate court, if that is OPA's wish.

In his opinion, which is printed in the appendix hereto p. 19, he stated that General Fleming had no authority because he had not been confirmed by the Senate as Price Administrator. It may safely be assumed that Judge McColloch's opinion in the *Findlay* case furnishes the reason for his decision in the instant cases since he pointed out in the *Findlay* case that it was one of several such cases.

On August 25, 1947, this Court granted the application of Frank R. Creedon, Housing Expediter, to be substituted as party-appellant herein in the place and stead of Philip B. Fleming in all of these cases (R. 94-95).

#### SPECIFICATION OF ERRORS

1. The court below erred in dismissing these actions for want of jurisdiction

#### ARGUMENT

### I

#### Fleming had authority to institute these cases

The desire of the court below to have General Fleming's authority to institute actions under the Emergency Price Control Act tested in an Appellate Court was satisfied in *Fleming v. Mohawk Wrecking & Lumber Co.*, 67 S. Ct. 1129, decided April 28, 1947. In that case the defendant argued that Fleming

could not be substituted for Paul Porter, in whose name the action had been commenced, because, *inter alia*, Fleming had not been confirmed by the Senate as Price Administrator. The Court rejected this contention and held that Fleming could be substituted, declaring (p. 1133):

To hold that an officer, previously confirmed by the Senate, must be once more confirmed in order to exercise the powers transferred to him by the President would be quite inconsistent with the broad grant of power given the President by the First War Powers Act. Any doubts on this score would, moreover, be removed by the recognition by Congress in a recent appropriation of the status of the Temporary Controls Administrator. That recognition was an acceptance or ratification by Congress of the President's action in Executive Order No. 9809. *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297, 301, 302, 57 S. Ct. 478, 479, 480, 81 L. Ed. 659; *Brooks v. Dewar, supra*.

For these reasons Fleming is a successor in office of Porter and may be substituted as a party under Rule 25, Rules of Civil Procedure, 28 U. S. C. A. following section 723 c.

In view of the Supreme Court's holding, the decision below was clearly erroneous.

Moreover, the recent appropriation by Congress for the Housing Expediter "to carry out the provisions of law and Executive Orders 9809 and 9841 relative to rent control" (Public Law 271, 80th Cong., Ch. 361,

1st Sess.)<sup>1</sup> is further evidence of Congressional intent that liabilities created prior to June 30, 1947, are not washed out after that date, and that Congress desired the Housing Expediter to proceed with suit to redress them (See too, *Fleming v. Mohawk Wrecking and Lumber Co.*, 331 U. S. at p. 119).

Just as recognition in the appropriation provided by Public Law 20, 80th Congress, 1st Session, constituted "an acceptance or ratification by Congress of the President's action in Executive Order No. 9809" (*Fleming v. Mohawk Wrecking and Lumber Co.*, 67 S. Ct. 1129, 1133, footnote 10), so too recognition in the appropriation of Public Law 271, 80th Congress, 1st Session, constituted ratification by Congress of the President's action in Executive Order No. 9841 (12 F. R. 2645), which transfers the functions with respect to rent control to the Housing Expediter (Section 202

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<sup>1</sup> "HOUSING EXPEDITER

"OFFICE OF RENT CONTROL

"Salaries and expenses, Office of Rent Control: For expenses necessary to carry out provisions of law and Executive Orders 9809 and 9841 relative to rent control, including personal services in the District of Columbia; services as authorized by section 15 of the Act of August 2, 1946 (Public Law 600), at rates not to exceed \$35 per diem for individuals; printing and binding; test rentals for enforcement purposes, authorization in each case to have prior approval of the Housing Expediter, or the Deputy Expediter, Rent Control, or the Regional Rent Administrator in the region in which the transaction is contemplated; hire of passenger motor vehicles; attendance at meetings of organizations concerned with rent control; and not to exceed \$175,000 for deposit in the Treasury for cost of penalty mail as required by the Act of June 28, 1944; \$18,074,000; \* \* \*" (Public Law 271, 80th Cong., Ch. 361, 1st sess.)

(a) of Executive Order No. 9841, *supra*), and includes among such functions, authority “to institute, maintain \* \* \* in his own name civil proceedings in any court \* \* \* relating to the matters transferred to him, including any such proceedings pending on the effective date of the transfer of any such function under this Act” (Section 402 of Executive Order No. 9841, *supra*). (See appendix, p. 12.)

#### CONCLUSION

The judgment below should be reversed and the cases remanded for further proceedings.

Respectfully submitted.

ED DUPREE,  
*Acting General Counsel,*

HUGO V. PRUCHA,  
*Chief Litigation Unit,*

IRVING M. GRUBER,  
*Chief Appellate Attorney,*

NATHAN SIEGEL,  
*Special Appellate Attorney,*  
*Office of the Housing Expediter,*  
*Temporary “E” Building, Washington 25, D. C.*

## APPENDIX A

1. The pertinent portions of the Emergency Price Control Act of 1942, 56 Stat. 23, 58 Stat. 632, 59 Stat. 306, 50 U. S. C. App. Supp. V, 901 et seq., provide as follows:

SECTION 1 (b). The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1947,<sup>2</sup> or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the Two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

SECTION 4 (a). It shall be unlawful, regardless of any contract, agreement, lease, or other

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<sup>2</sup> Originally "June 30, 1943." On October 2, 1942, amended to read "June 30, 1944" (sec. 7 (a) of Stabilization Act of 1942, 56 Stat. 767). On June 30, 1944, amended to read "June 30, 1945" (sec. 101 of Stabilization Extension Act of 1944, 58 Stat. 632). On June 30, 1945, amended to read "June 30, 1946" (sec. 1 of Pub. Law 108, 79th Cong., 1st sess.). On July 25, 1946, amended to read "June 30, 1947" (sec. 1 of the Price Control Extension Act of 1946, Pub. Law 548, 79th Cong., 2d sess.).

obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 206 \* \* \* or to offer, solicit, attempt, or agree to do, any of the foregoing.

SECTION 205 (a). Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

Section 205 (e). If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is

based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges or \$25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. \* \* \*

### EXECUTIVE ORDER 9809 (11 F. R. 14281)

#### PROVIDING FOR THE DISPOSITION OF CERTAIN WAR AGENCIES

By virtue of the authority vested in me by the Constitution and statutes, including Title I of the First War Powers Act, 1941, Title III of the Second

War Powers Act, 1942, section 201 (b) of the Emergency Price Control Act of 1942, as amended, and section 2 of the Stabilization Act of 1942, and as President of the United States, it is hereby ordered, for the purpose of further effectuating the transition from war to peace and in the interest of the internal management of the Government, as follows:

1. Except as otherwise provided in this order, the following agencies and their functions are consolidated to form one agency in the Office for Emergency Management of the Executive Office of the President, which shall be known as the Office of Temporary Controls, namely: the Office of War Mobilization and Reconversion, the Office of Economic Stabilization, the Office of Price Administration, and the Civilian Production Administration. Consistent with applicable law, the Office of Temporary Controls shall be organized and its functions shall be administered in such manner as the head thereof may deem desirable.

2. There shall be at the head of the Office of Temporary Controls a Temporary Controls Administrator, hereafter referred to as the Administrator, who shall be appointed by the President and who shall receive a salary at the rate of \$12,000 per annum unless the Congress shall otherwise provide. Except as otherwise provided in this order, the functions of the Director of War Mobilization and Reconversion, the Economic Stabilization Director, the Price Administrator, and the Civilian Production Administrator, including such functions of the President as are now administered by the said officers, are vested in the Administrator. The functions hereby vested in the Administrator shall be deemed to include the authority to maintain in his own name civil proceedings relating to matters heretofore under the jurisdiction



of the Price Administrator (including any such proceedings now pending).

3. \* \* \*
4. \* \* \*
5. \* \* \*
6. \* \* \*
7. \* \* \*
8. \* \* \*
9. \* \* \*
10. \* \* \*

11. The authority, records, property, and personnel which relate primarily to the functions redistributed by this order are transferred to the respective agencies in which functions are vested pursuant to the provisions of this order and the funds which relate primarily to such functions are transferred or otherwise made available to such respective agencies: *Provided*, That the Director of the Bureau of the Budget may in any case limit the records, property, personnel, and funds to be so transferred or made available to so much thereof as he deems to be required for the administration of the transferred functions. Such further measures and dispositions as may be determined by the Director of the Bureau of the Budget to be necessary to effectuate the purposes and provisions of this paragraph shall be carried out in such manner as the Director of the Bureau of the Budget may direct and by such agencies as he may designate. All personnel transferred under the provisions of this order which the transferee agencies shall respectively find to be in excess of the personnel necessary for the administration of the functions transferred to such agencies by this order shall, if not retransferred under existing law to other positions in the Government, be separated from the service.

12. All prior Executive orders or parts thereof in conflict with this order are amended accordingly. All other prior orders, regulations, rulings, directives, and other actions relating to any function or agency transferred by this order or issued by any such agency shall remain in effect except as they are inconsistent herewith or are hereafter amended or revoked under proper authority.

13. The provisions of this order shall become effective immediately except that the provisions of paragraph 10 hereof, and those of paragraph 11 to the extent that they relate to the functions referred to in paragraph 10, shall become effective on February 24, 1947.

HARRY S. TRUMAN.

THE WHITE HOUSE,

*December 12, 1946.*

#### EXECUTIVE ORDER 9841 (12 F. R. 2645)

##### TERMINATION OF THE OFFICE OF TEMPORARY CONTROLS

Whereas the Congress, in the Urgent Deficiency Appropriation Act, 1947, approved March 22, 1947, has declared its intent that the Office of Temporary Controls be closed and liquidated by June 30, 1947; and

Whereas it is necessary to provide for the orderly liquidation of such Office and the disposition of its residual affairs:

Now, therefore, by virtue of the authority vested in me by the Constitution and Statutes, including the last paragraph of Title I of the First Supplemental Surplus Appropriation Rescission Act, 1946, approved February 18, 1946, Title III of the Second War Powers Act, 1942 as amended by the First Decontrol

Act of 1947, section 201 (b) of the Emergency Price Control Act of 1942, as amended, section 2 of the Stabilization Act of 1942, as amended, and Title I of the First War Powers Act, 1941, and as President of the United States, it is hereby ordered, in the interest of the internal management of the Government, as follows:

## Part I

101. The Office of Temporary Controls, established by Executive Order No. 9809 of December 12, 1946, shall be terminated and disposition shall be made of its functions according to the provisions of this order.

## Part II

201. The provisions of this Part shall become effective on May 4, 1947.

202. Functions of the Temporary Controls Administrator under the Emergency Price Control Act of 1942, as amended, Executive Order No. 9809, and any other statute, order, or delegation are transferred as follows:

(a) Functions with respect to rent control are transferred to the Housing Expediter and shall be performed by him or, subject to his direction and control, by such officers or agencies of the Government as he may designate.

(b) Functions with respect to price control over rice are transferred to the Secretary of Agriculture and shall be performed by him or, subject to his direction and control, by such officers or agencies of the Department of Agriculture as he may designate.

(c) Functions with respect to (1) subsidies, including determinations of the correct amounts of claims and the recovery of over-payments (but excluding

premium-payment functions transferred under paragraph 302 (b) hereof); (2) applications for price adjustments filed under Supplementary Order 9 and Procedural Regulation 6 (Adjustment of Maximum Prices for Commodities and Services under Government Contracts or Subcontracts, 7 F. R. 5087, 5444) of the Office of Price Administration; and (3) the interpretation and application of price and subsidy regulations and orders which affect the amount of subsidy payable; are transferred to the Reconstruction Finance Corporation.

203. The following functions of the Temporary Controls Administrator are transferred to the Secretary of Commerce and shall be performed by him or, subject to his direction and control, by such officers and agencies of the Department of Commerce as he may designate:

(a) Functions of the President under Title III of the Second War Powers Act, 1942, as amended, vested in the Temporary Controls Administrator immediately prior to the taking of effect of this Part.

(b) Functions with respect to determining, under section 6 (a) of the Strategic and Critical Materials Stockpiling Act, the amount of strategic and critical materials necessary to make up any deficiency of the supply thereof for the current requirements of industry.

(c) Functions under section 124 of the Internal Revenue Code, as amended.

(d) Functions under section 12 of the act of June 11, 1942 (the Small Business Mobilization Act).

(e) Functions with respect to claims relating to the expansion of the capacity of defense plants when such expansion is alleged to have been undertaken at the request of the War Production Board or any of its predecessor agencies.

(f) Functions with respect to claims relating to property requisitioned by the Chairman of the War Production Board or by any of his predecessors.

(g) Except as otherwise provided by statute or this or any other Executive order, all other functions of the Temporary Controls Administrator which were immediately prior to the taking of effect of Executive Order No. 9809 vested in the Civilian Production Administrator.

204. Executive Order No. 9705 of March 15, 1946 (as modified by Executive Orders Nos. 9762 and 9809) is revoked.

205. Any authority vested in the Temporary Controls Administrator in pursuance of section 120 of the National Defense Act of 1916 (with respect to placing compulsory orders for products or materials) is withdrawn and terminated.

### Part III

301. The provisions of this Part shall become effective June 1, 1947.

302. All functions vested in the Temporary Controls Administrator by Executive Order No. 9809 not otherwise disposed of by statute or by this or any other Executive order are transferred to the Secretary of Commerce and shall be performed by him or, subject to his direction and control, by such officers or agencies of the Department of Commerce as the Secretary may designate. Such functions shall include, but not be limited to, the following:

(a) Functions of the President under the Stabilization Act of 1942, as amended, vested in the Temporary Controls Administrator immediately prior to the taking of effect of this Part.

(b) Functions with respect to premium payments under section 2 (e) (a) (2) of the Emergency Price

Control Act of 1942, as amended, insofar as such payments relate to copper, lead, and zinc ores.

(c) Functions with respect to the establishment of maximum prices for industrial alcohol sold to the Government or its agencies.

(d) The liquidation of the functions of the Office of Temporary Controls and of the agencies thereof, except liquidation relating to functions specifically transferred to other agencies (by the provisions of this order or otherwise).

303. The Office of Temporary Controls is terminated.

#### PART IV

401. The provisions of this Part shall become effective, respectively, on the dates on which functions are transferred or otherwise vested by the provisions of this order.

402. Functions under the Emergency Price Control Act of 1942, as amended, transferred under the provisions of this order shall be deemed to include authority on the part of each officer to whom such functions are transferred hereunder to institute, maintain, or defend in his own name civil proceedings in any court (including the Emergency Court of Appeals), relating to the matters transferred to him, including any such proceedings pending on the effective date of the transfer of any such function under this order. The provisions of this paragraph shall be subject to the provisions of the Executive order entitled "Conduct of Certain Litigation Arising Under Wartime Legislation," issued on the date of this order and effective June 1, 1947.

403. (a) The records, property, and personnel relating primarily to the respective functions transferred under the provisions of this order shall be

transferred, and the funds relating primarily to such respective functions shall be transferred or otherwise made available, to the agencies to which such functions are transferred. Such measures and dispositions as may be determined by the Director of the Bureau of the Budget to be necessary to effectuate the purposes and provisions of this paragraph shall be carried out in such manner as the Director may determine and by such agencies as he may designate.

(b) In order that the confidential status of any records affected by this order shall be fully protected and maintained, the use of any confidential records transferred hereunder shall be so restricted by the respective agencies as to prevent the disclosure of information concerning individual persons or firms to persons who are not engaged in functions or activities to which such records are directly related, except as provided for by law or as required in the final disposition thereof pursuant to law.

404. All provisions of prior Executive orders in conflict with this order are amended accordingly. All other prior and currently effective orders, rules, regulations, directives, and other similar instruments relating to any function transferred by the provisions of this order or issued by any agency terminated hereunder or by any predecessor or constituent agency thereof, shall remain in effect except as they are inconsistent herewith or are hereafter amended or revoked under proper authority.

405. As used in this order, "functions" includes powers, duties, authorities, discretions, and responsibilities.

HARRY S. TRUMAN.

THE WHITE HOUSE,  
*April 23, 1947.*

## APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES FOR  
THE DISTRICT OF OREGON

Civil No. 3437

PHILIP B. FLEMING, ADMINISTRATOR, OFFICE OF TEM-  
PORARY CONTROLS, PLAINTIFF

*vs.*

MRS. T. A. FINDLAY AND REUBEN G. LENSKE,  
DEFENDANTS

### MEMORANDUM OPINION

I am dismissing this case which is one of several that have recently been filed so that the authority of General Fleming can be tested in an appellate court, if that is OPA's wish.

I am dismissing the case on jurisdictional grounds which are said always to justify a Court's acting on its own motion. I am dismissing it for the following specific reasons:

The Price Control Act was enacted in 1942. The Act put the national government into a domestic field never before entered. The field was entered as a war measure. The Act provided that the great new federal powers thus asserted should be exercised by an administrator appointed by the President "by and with the advice and consent of the Senate." Four Administrators were thus appointed and confirmed.

Now it is said and while still purported to exercise war powers, that the President can put these great—and to many under present conditions, questionable



powers—in the hands of an executive not confirmed nor to be confirmed by the Senate.

The President's action cannot be upheld, in my opinion, without doing violence to constitutional principle. Ours is a government of divided powers and the outstanding domestic problem of the hour is to restore constitutional equilibrium. It is being found more difficult, I think, to regain war powers than had been expected. I put my judgment and cast my influence in the present situation on the side of diminution of extraordinary executive power rather than on the side of expansion of it, for it is obvious if the President can appoint a price and rent administrator now without consulting the Senate, he could have done so at any time during the war.

Dated at Portland, Oregon, this 15th day of February 1947.

(S) CLAUDE MCCOLLOCH,  
*District Judge.*



No. 11671

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United States  
Circuit Court of Appeals  
For the Ninth Circuit

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UNITED STATES OF AMERICA,  
Appellant,

VS.

SHOFNER IRON AND STEEL WORKS, a Cor-  
poration,  
Appellee.

---

Transcript of Record

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Upon Appeal from the District Court of the United States  
for the District of Oregon

FILED

SEP 10 1947

PAUL P. O'BRIEN



United States  
Circuit Court of Appeals  
For the Ninth Circuit

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UNITED STATES OF AMERICA,  
Appellant,

vs.

SHOFNER IRON AND STEEL WORKS, a Cor-  
poration,  
Appellee.

---

Transcript of Record

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Upon Appeal from the District Court of the United States  
for the District of Oregon



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

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U. S. Attorney.

J. ROBERT PATTERSON and  
VICTOR E. HARR,  
Assistant U. S. Attorneys,  
U. S. Court House,  
Portland, Oregon.

A. DEVITT VANECH,  
Asst. Atty. Gen'l.

ROGER P. MARQUIS and  
WILMA C. MARTIN,  
Dept. of Justice,  
Washington, D. C.,  
For Appellant.

ALBERT M. HODLER and  
MacCORMAC SNOW,  
Pacific Bldg.,  
Portland, Oregon.

W. K. PHILLIPS and  
SHEPPARD & PHILLIPS,  
Public Service Bldg.,  
Portland, Oregon,  
For Appellee.

In the District Court of the United States  
for the District of Oregon

Civil No. 3224

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SHOFNER IRON AND STEEL WORKS,

Defendant.

### COMPLAINT

The United States of America, by Henry L. Hess, United States Attorney for the District of Oregon, and J. Robert Patterson, Assistant United States Attorney, for its cause of action, says:

#### I.

This is a civil action brought by the United States and this Court has jurisdiction under Section 24(1) of the Judicial Code, 28 U.S.C. 41(1).

#### II.

Defendant is a corporation organized under the laws of the State of Oregon and authorized to do business in the State of Oregon.

#### III.

On or about September, 1942, in contemplation of acquisition of the lands hereinafter described by the Defense Plant Corporation, a wholly owned governmental corporation, said Defense Plant Corporation entered into an agreement of lease with de-

fendant, whereby Defense Plant Corporation agreed to and did lease to said defendant the following described property situated in the State of Oregon, County of Multnomah:

“Tract 1: Beginning at a point on the northeasterly line of N. W. Yeon Avenue where it intersects the division line between tracts “C” and “D” as shown upon the map of the estate of Peter Guild, deceased, as divided among the heirs, pursuant to decree of partition entered February 28, 1873, in Journal 8, page 640, J.R. 4508, and recorded in Deed Book X, page 56; thence south  $47^{\circ} 00'$  east along the said northeasterly line of N. W. Yeon Avenue, 235.24' to the most westerly corner of that certain tract of land conveyed to the United States of America by deed recorded March 5, 1937, in P. S. Book 380, page 437; thence north  $40^{\circ} 51'$  east along the northwesterly line of said tract 109.1 feet to the true point of beginning of the tract to be described; running thence north  $40^{\circ} 51'$  east 186.77 feet, more or less, to the most northerly corner of that certain [1\*] 30-foot easement heretofore conveyed to the United States of America by deed dated March 3, 1937, recorded in P.S. Deed Book 380, page 437, on March 5, 1937; thence southeasterly to the most westerly corner of that certain tract of land conveyed to Portland Linseed Oil Company by deed recorded July 7, 1888, in Deed Book 103,

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\* Page numbering appearing at foot of page of original certified Transcript of Record.

page 450; thence north  $40^{\circ} 51'$  east, along the northwesterly boundary line of the Portland Linseed Oil Company tract, 106.24 feet to the most northerly corner of said tract and in the southwesterly line of the Northern Pacific Railway Company's right of way; thence north  $48^{\circ} 43'$  west along said line of right of way, 152.75 feet; thence south  $42^{\circ} 45'$  west 282.07 feet; thence south  $47^{\circ} 00'$  east 124.76 feet to the place of beginning."

#### IV.

In accordance with the terms of said lease, Defense Plant Corporation acquired title to the foregoing described property from Shofner Iron & Steel Works by deed dated January 30, 1943, recorded as Document 2508 in Book 730 at page 329.

#### V.

Pursuant to the Act of June 30, 1945, 59 Stat. 310, Reconstruction Finance Corporation, on July 1, 1945, succeeded to all right, title and interest of Defense Plant Corporation in the aforesaid land and to all rights of said Defense Plant Corporation under said lease. Thereafter, said lease was duly terminated, in accordance with its terms, by Reconstruction Finance Corporation, said termination becoming effective as of December 5, 1945.

#### VI.

Two interim consent agreements were thereafter executed by Reconstruction Finance Corporation

whereby defendant was permitted to remain in possession until May 15, 1946. Since May 15, 1946, defendant has remained in possession of said premises without authority, right, title or interest.

## VII.

On May 24, 1946, Reconstruction Finance Corporation declared said premises and facilities surplus, pursuant to the Surplus Property Act of October 3, 1944, 58 Stat. 865, as amended, and, pursuant to said Act as amended and regulations thereunder, did transfer jurisdiction of said premises to the War Assets Administration, an administrative agency of the plaintiff, established by Executive Order 9689, dated January 31, 1946. [2]

## VIII.

Plaintiff is entitled to the possession of said premises and, although defendant has no right, title or interest therein, nor the right to possession thereof, said defendant is unlawfully and wrongfully withholding possession of the aforesaid premises from the plaintiff.

Wherefore, plaintiff prays judgment against defendant for possession of said real estate, for its costs, and for such further relief as may be proper and necessary.

HENRY L. HESS,

United States Attorney for  
the District of Oregon.

/s/ J. ROBERT PATTERSON,

Asst. United States Attorney.

United States of America,  
District of Oregon—ss.

I, J. Robert Patterson, being first duly sworn, depose and say: That I am a duly appointed, qualified and acting Assistant United States Attorney for the District of Oregon; that I am possessed of information concerning the above-named defendant, from which I have prepared the foregoing Complaint, and that the allegations contained in said Complaint are true, as I verily believe.

/s/ J. ROBERT PATTERSON.

Subscribed and sworn to before me this 12th day of August, 1946.

[Seal]                      LOWELL MUNDORFF,  
Clerk of the District Court of the United States for  
the District of Oregon.

By /s/ H. S. KENYON,  
Deputy.

[Endorsed]: Filed August 12, 1946. [3]

District Court of the United States for the  
District of Oregon

Civil Action File No. 3224

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SHOFNER IRON AND STEEL WORKS,

Defendant.

SUMMONS IN A CIVIL ACTION

To the above-named Defendant:

You are hereby summoned and required to appear and defend this action and to serve upon Henry L. Hess, U. S. Attorney; and J. Robert Patterson, Assistant U. S. Attorney, plaintiff's attorney, whose address is U. S. Court House, Portland, Oregon, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: August 13, 1946.

[Seal]                      LOWELL MUNDORFF,  
Clerk of Court.

By /s/ F. L. BUCK,  
Chief Deputy Clerk.

## RETURN OF SERVICE OF WRIT

I hereby certify and return, that on the 14th day of Aug., 1946, I received the within summons & complaint and on that date served C. A. Shepherd, President of Shofner Iron Works.

/s/ JACK R. CAUFIELD,  
United States Marshal.

By /s/ FRANK L. MEYER,  
Deputy United States  
Marshal.

[Endorsed]: Filed August 19, 1946. [4]



[Title of District Court and Cause.]

### MOTION

Comes now the defendant and based upon the affidavit of Chester A. Sheppard, moves this court for an order for leave to serve the Reconstruction Finance Corporation, an agency of the United States of America, with a third party complaint and summons in order that the defendant may be permitted to assert a counter-claim in the above-entitled action for the purpose of having the entire matter adjudicated in one cause.

This motion is based on Rule 14, Rule 17, subdivision A, and Rule 13, subdivision D, of Federal Rules of Civil Procedure.

/s/ ALBERT M. HODLER,

/s/ W. K. PHILLIPS,

Attorneys for Defendant.

Due service of the foregoing Motion by copy as prescribed by law is hereby admitted, at Portland, Oregon, this 13th day of September, 1946.

/s/ J. ROBERT PATTERSON,

Attorney for Plaintiff.

[Endorsed]: Filed September 13, 1946. [5]

[Title of District Court and Cause.]

AFFIDAVIT OF CHESTER A. SHEPPARD

State of Oregon,

County of Multnomah—ss.

I, Chester A. Sheppard, being first duly sworn, depose and say:

That Shofner Iron & Steel Works is a corporation duly organized and existing under the general incorporation laws of the State of Oregon;

That on or about August 1, 1944, your affiant was elected president of the Shofner Iron & Steel Works, and has been the president of said corporation ever since said time;

That the Defense Plant Corporation was, at the time of the execution of the lease agreement mentioned in the complaint, a corporation duly organized and existing under and by virtue of the laws of the United States, having been created by the Reconstruction Finance Corporation; and that said Defense Plant Corporation was dissolved July 1, 1945, and all of its assets were transferred to and all of its functions, powers and duties and authority were assumed by the Reconstruction Finance Corporation;

That on or about September, 1942, the Defense Plant Corporation acquired the tract of land described in plaintiff's [6] complaint, which tract of land is immediately adjoining and contiguous to a

tract of land owned by the defendant; that immediately after acquiring said tract of land, the Defense Plant Corporation, through its duly authorized agents, erected and constructed a foundry building upon the tract of land described in plaintiff's complaint, and said Defense Plant Corporation caused appropriate foundry machinery to be installed in said building located on said premises; that thereafter the Defense Plant Corporation entered into an agreement of lease with the defendant wherein and whereby the Defense Plant Corporation agreed to and did lease to said defendant the real property described in plaintiff's complaint;

That on or about July 1, 1945, the Reconstruction Finance Corporation succeeded to all the right, title and interest of the Defense Plant Corporation in the land described in plaintiff's complaint; and thereafter, on December 5, 1945, the Reconstruction Finance Corporation terminated the said lease.

That thereafter the Reconstruction Finance Corporation gave permission to the Shofner Iron & Steel Works to use and occupy the said premises created by the Defense Plant Corporation, conditioned that Shofner Iron & Steel Works would keep and perform certain conditions and stipulations made by the Reconstruction Finance Corporation; that one of said conditions was that the Shofner Iron & Steel Works should carry fire insurance and public liability insurance on its building and properties, said insurance to be made payable to the Reconstruction Finance Corporation; and that

ever since said agreements were entered into between the Shofner Iron & Steel Works and the Reconstruction Finance Corporation, the Shofner Iron & Steel Works has secured and paid for fire insurance and public liability insurance payable to the [7] Reconstruction Finance Corporation, all in accordance with their said agreement, and said policies of insurance have been retained and are now held and enjoyed by the Reconstruction Finance Corporation.

Further, affiant says that the Shofner Iron & Steel Works has a good, valid and legal claim for breach of contract against the Reconstruction Finance Corporation which should be determined in this lawsuit; that said claim against the Reconstruction Finance Corporation arises out of an agreement entered into between the Defense Plant Corporation and Shofner Iron & Steel Works, by the terms of which agreement the Defense Plant Corporation agreed, in the latter part of the year 1944, to make certain changes in its plant according to plans and specifications prepared by the Shofner Iron & Steel Works; that said plans and specifications called for the expenditure of \$103,000.00. That at the time said agreement was entered into, the war in the Pacific was at its height and the combined facilities of the Shofner foundry and the Defense Plant foundry were insufficient to produce the castings required by the Army and the Navy, and the Defense Plant Corporation was anxious to have its facilities increased to the end that steel castings might be

promptly furnished to the Army and the Navy; that at said time the combined capacity of the plant of the Defense Plant Corporation and the Shofner plant was approximately 200 tons per month, and it was desirable and necessary that said capacity be increased from 200 tons per month to between 350 and 400 tons per month; that the Defense Plant Corporation required the Shofner Iron & Steel Works to prepare plans and specifications for said changes, and that Shofner Iron & Steel Works did prepare plans and specifications showing what changes were necessary in order to increase production; that thereupon the Defense Plant Corporation [8] required the Shofner Iron & Steel Works to get the approval of the War Production Board, the Steel Division and the Facilities Division, before it proceeded with the said changes; that Shofner Iron & Steel Works did get the approval of the Steel Division and the Facilities Division of the War Production Board, and turned said approval over to the Defense Plant Corporation; that upon receipt of said approval, and prior thereto, the Defense Plant Corporation promised and agreed to promptly make the changes requested in the plans and specifications so prepared; that the Defense Plant Corporation never at any time made any of the changes recommended or approved, which failure on the part of the Defense Plant Corporation injured and damaged the Shofner Iron & Steel Works more than \$250,000.00.

Affiant says that the Reconstruction Finance Cor-

poration should be brought into this litigation for the further reason that Shofner Iron & Steel Works has other rights and claims against the Reconstruction Finance Corporation that cannot be determined in this litigation without the presence of the Reconstruction Finance Corporation.

Further affiant sayeth naught, except that this affidavit is made in support of the motion to which this affidavit is attached.

/s/ CHESTER A. SHEPPARD.

Subscribed and sworn to before me this 12th day of September, 1946.

[Seal]

CARRIE BELLE CANN,

Notary Public for Oregon.

My Commission expires August 28, 1949. [9]

[Title of District Court and Cause.]

### ORDER

This matter coming on to be heard before the undersigned judge of the above-entitled Court on the defendant's motion for leave to serve the Reconstruction Finance Corporation with a third party complaint and summons, the plaintiff appearing by Henry L. Hess, United States Attorney, and J. Robert Patterson, Assistant United States Attorney, and the defendant appearing by its attorneys, Albert M. Hodler and W. K. Phillips, the Court having heard the argument of both parties and having considered the briefs submitted on behalf of both parties and being fully advised,

It Is Therefore Ordered that the defendant's motion be and the same is hereby denied and the defendant is given ten (10) days within which to appear further in this cause.

Dated at Portland, Oregon, this 15th day of November, 1946.

/s/ CLAUDE McCULLOCH,  
District Judge.

[Endorsed]: Filed November 15, 1946. [10]

[Title of District Court and Cause.]

## AMENDED COMPLAINT

The United States of America, by Henry L. Hess, United States Attorney for the District of Oregon, and J. Robert Patterson, Assistant United States Attorney, for its cause of action says:

### I.

This is a civil action brought by the United States and this Court has jurisdiction under Section 24(1) of the Judicial Code, 28 U.S.C. 41(1).

### II.

Defendant is a corporation organized under the laws of the State of Oregon and authorized to do business in the State of Oregon.

### III.

On or about September, 1942, in contemplation of acquisition of the lands hereinafter described by the Defense Plant Corporation, a wholly owned governmental corporation, said Defense Plant Corporation entered into an agreement of lease with defendant, whereby Defense Plant Corporation agreed to and did lease to said defendant the following described property situated in the State of Oregon, County of Multnomah:

“Tract 1: Beginning at a point on the northeasterly line of N.W. Yeon Avenue where it intersects the division line between tracts “C” and “D” as shown upon the map of the Estate



of Peter Guild, deceased, as divided among the heirs, pursuant to decree of partition entered February 28, 1873, in Journal 8, page 640, J.R. 4508, and recorded in Deed Book X, page 56; thence south  $47^{\circ} 00'$  east along the said northeasterly line of N.W. Yeon Avenue, 235.24' to the most westerly corner of that certain tract of land conveyed to the United States of America by deed recorded March 5, 1937, in P. S. Book 380, page 437; thence north  $40^{\circ} 51'$  east along the northwesterly line of said tract 109.1 feet to the true point of beginning of the tract to be described; running thence north  $40^{\circ} 51'$  east 186.77 feet, more or less, to the most northerly corner of that certain [11] 30-foot easement heretofore conveyed to the United States of America by deed dated March 3, 1937, recorded in P.S. Deed Book 380, page 437, on March 5, 1937; thence southeasterly to the most westerly corner of that certain tract of land conveyed to Portland Linseed Oil Company by deed recorded July 7, 1888, in Deed Book 103, page 450; thence north  $40^{\circ} 51'$  east, along the northwesterly boundary line of the Portland Linseed Oil Company tract, 106.24 feet to the most northerly corner of said tract and in the southwesterly line of the Northern Pacific Railway Company's right of way; thence north  $48^{\circ} 43'$  west along said line of right of way, 152.75 feet; thence south  $42^{\circ} 45'$  west 282.07 feet; thence south  $47^{\circ} 00'$  east 124.76 feet to the place of beginning."

## IV.

In accordance with the terms of said lease, Defense Plant Corporation acquired title to the foregoing described property from Shofner Iron & Steel Works by deed dated January 30, 1943, recorded as Document 2508 in Book 730 at Page 329.

## V.

Pursuant to the Act of June 30, 1945, 59 Stat. 310, Reconstruction Finance Corporation, on July 1, 1945, succeeded to all right, title and interest of Defense Plant Corporation in the aforesaid land and to all rights of said Defense Plant Corporation under said lease. Thereafter, said lease was duly terminated, in accordance with its terms, by Reconstruction Finance Corporation, said termination becoming effective as of December 5, 1945.

## VI.

Two interim consent agreements were thereafter executed by Reconstruction Finance Corporation whereby defendant was permitted to remain in possession until May 15, 1946. Since May 15, 1946, defendant has remained in possession of said premises without authority, right, title or interest.

## VII.

On May 24, 1946, Reconstruction Finance Corporation declared said premises and facilities surplus, pursuant to the Surplus Property Act of October 3, 1944, 58 Stat. 865, as amended, and, pursuant to said Act as amended and regulations there-

under, did transfer jurisdiction of said premises to the War Assets Administration, an administrative agency of the plaintiff, established by Executive Order No. 9689, dated January 31, 1946. [12]

### VIII.

Plaintiff is entitled to the possession of said premises and, although defendant has no right, title or interest therein, nor the right to possession thereof, said defendant is unlawfully and wrongfully withholding possession of the aforesaid premises from the plaintiff.

For a second cause of action, plaintiff complains and alleges:

#### I.

Plaintiff refers to and corporates by reference in his second cause of action paragraphs one and two of the plaintiff's first cause of action.

#### II.

That on or about the 28th day of September, 1943, the defendant by a written agreement of lease with plaintiff, agreed to and did lease to the said plaintiff the following described property situated in the State of Oregon, County of Multnomah:

Parcel 1—Beginning at the intersection of the Northeasterly line of N.W. Yeon Avenue with the division line between Tracts C and D as shown upon the map of the estate of Peter Guild, deceased, as divided among the heirs pur-

suant to decree of partition entered February 28, 1873, Journal 8, page 640, J.R. 4508 and recorded in Deed Book X, page 56, Records of Deeds of Multnomah County. Oregon; thence South  $47^{\circ} 00'$  East along said Northeasterly line of N.W. Yeon Avenue 110.48 feet; thence North  $40^{\circ} 51'$  East 109.1 feet to the most Southwesterly corner of the property now owned by the Defense Plant Corporation; thence North  $40^{\circ} 51'$  East 10.9 feet along the Northwesternly boundary of the property now owned by the Defense Plant Corporation; thence North  $47^{\circ} 00'$  West 150 feet; thence South  $40^{\circ} 51'$  West 120 feet to the said Northeasterly line of N. W. Yeon Avenue; thence South  $47^{\circ} 00'$  East 39.52 feet to the place of beginning.

Parcel 2—Beginning at the intersection of the Northeasterly line of N.W. Yeon Avenue, with the division line between Tracts C and D as shown upon the map of the estate of Peter Guild, deceased, as divided among the heirs, pursuant to decree of partition entered February 28, 1873, Journal 8, Page 640, J.R. 4508, and recorded in Deed Book X, page 56; thence North  $47^{\circ} 00'$  West 39.52 feet to the true point of beginning; thence North  $40^{\circ} 51'$  East 120 feet; thence South  $47^{\circ} 00'$  East 150 feet to the Northwesternly boundary of that property now owned by the Defense Plant Corporation; thence North  $42^{\circ} 45'$  East 89.1 feet; thence North  $47^{\circ} 00'$  West 288.30 feet; thence South  $40^{\circ} 51'$  West 209.10 feet to the Northerly line

of N.W. Yeon Avenue; thence South 47° 00' East 138.30 feet to the true point of beginning.

### III.

By the terms of the said lease, the defendant leased to the plaintiff the said property from the 28th day of September 1943 to and including the 23rd day of March 1963, and that the plaintiff had complied with all the conditions of the said lease and that the plaintiff is entitled to the possession of the said premises and although defendant has no right to the possession thereof, said defendant is unlawfully, and wrongfully, withholding possession of the aforesaid property from the plaintiff.

Wherefore, Plaintiff prays judgment against the defendant for possession of the said real estate, and for costs and disbursements incurred herein, and for such further relief as may be proper and necessary.

HENRY L. HESS,

United States Attorney for  
the District of Oregon.

/s/ J. ROBERT PATTERSON,

Assistant United States  
Attorney.

United States of America,  
District of Oregon—ss.

I, J. Robert Patterson, being first duly sworn, depose and say: That I am a duly appointed, qualified and acting Assistant United States Attorney for the District of Oregon; that I am possessed of information concerning the above-named defendant,

from which I have prepared the foregoing Complaint, and that the allegations contained in said Complaint are true, as I verily believe.

/s/ J. ROBERT PATTERSON.

Subscribed and sworn to before me this 26th day of November, 1946.

LOWELL MUNDORFF,  
Clerk of the District Court of the United States for  
the District of Oregon.

By /s/ H. S. KENYON,  
Deputy. [14]

United States of America,  
District of Oregon—ss.

I, J. Robert Patterson, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service of the foregoing Amended Complaint, Civil No. 3224, by depositing in the United States Post Office at Portland, Oregon on the 26th day of November, 1946, duly certified copies thereof, enclosed in envelopes, with postage thereon prepaid, addressed to Albert M. Hodler, Attorney at Law, 1208 Public Service Building, Portland, Oregon and MacCormac Snow, Attorney at Law, Pacific Building, Portland, Oregon, Attorneys for the Defendant.

/s/ J. ROBERT PATTERSON,  
Assistant United States  
Attorney.

[Endorsed]: Filed November 26, 1946. [15]

[Title of District Court and Cause.]

MOTION

Comes the defendant and moves the above entitled court for the dismissal of the above entitled cause or in the alternate for the striking from the files thereof of the complaint and the amended complaint.

The ground of this motion is that neither the complaint nor the amended complaint states a claim on which relief can be granted (F.R.C.P. 12-B-6) and for the reason that the plaintiff is not the real party in interest. (F.R.C.P. 17-A)

/s/ MacCORMAC SNOW,  
/s/ ALBERT M. HODLER,  
Attorneys for Defendant.

Service of the within motion is admitted this 5th day of December, 1946.

/s/ VICTOR E. HARR,  
Of Attorneys for Plaintiff.

[Endorsed]: Filed December 5, 1946. [16]

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[Title of District Court and Cause.]

ORDER IN RE OPINION

The Court hands down its opinion and directs that an order be prepared in accordance therewith.

February 6, 1947. [17]

[Title of District Court and Cause.]

### ORDER

This cause coming on to be heard on the motion of defendant for dismissal of the above-entitled cause or in the alternate for the striking from the files thereof of the complaint and the amended complaint, and the court having heard the argument of counsel for the parties and examined briefs on behalf of the parties, now therefore it is

Considered and Ordered as follows:

1. The first cause of action alleged in the amended complaint shall be and is hereby dismissed and said first cause of action is stricken from the files.

2. The said motion is denied with respect to the original complaint.

3. The said motion is denied with respect to the second cause of action alleged in the amended complaint.

Dated this 13 day of February, 1947.

/s/ R. LEWIS BROWN,  
Judge.

Portland, Ore. Approved as to form, Feb. 11,  
1947.

J. ROBERT PATTERSON,  
Ass't. U. S. Attorney.

[Endorsed]: Filed February 15, 1947. [18]



[Title of District Court and Cause.]

MOTION

Comes now the Plaintiff by Henry L. Hess, United States Attorney for the District of Oregon, and J. Robert Patterson, Assistant United States Attorney, and moves the Court to amend that certain Order entered in the above entitled cause on the 15th day of February, 1947, so as to provide and grant the Plaintiff five days within which to file its amended Complaint, naming the Reconstruction Finance Corporation as a party plaintiff in this cause.

Dated at Portland, Oregon, this 19th day of February, 1947.

HENRY L. HESS,

United States Attorney for  
the District of Oregon.

/s/ J. ROBERT PATTERSON,

Asst. United States Attorney.

[Affidavit of service by mail attached.]

[Endorsed]: Filed February 19, 1947. [19]

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[Title of District Court and Cause.]

DECISION ON MOTION TO AMEND ORDER  
OF FEBRUARY 15, 1947

Plaintiff moves the Court as follows: Comes now the Plaintiff by Henry L. Hess, United States Attorney for the District of Oregon, and J. Robert Pat-

terson, Assistant United States Attorney, and moves the Court to amend that certain Order entered in the above entitled cause on the 15th day of February, 1947, so as to provide and grant the Plaintiff five days within which to file its amended Complaint, naming the Reconstruction Finance Corporation as a party plaintiff in this cause.

The Order referred to in the motion after the entitlement of court and cause is as follows: "This cause coming on to be heard on the motion of defendant for dismissal of the above entitled cause or in the alternate for the striking from the files thereof of the complaint and the amended complaint, and the court having heard the argument of counsel for the parties and examined briefs on behalf of the parties, now therefore it is

"Considered and Ordered as follows:

"1. The first cause of action alleged in the amended complaint shall be and is hereby dismissed and [20] said first cause of action is stricken from the files.

"2. The said motion is denied with respect to the original complaint.

"3. The said motion is denied with respect to the second cause of action alleged in the amended complaint.

"Dated this 13 day of February, 1947.

"Signed R. Lewis Brown, Judge."

Paragraph No. 1 of said Order is a final decision and is appealable. *Wright v. Gibson*, 9 Cir., 128 F. 2d 865.

The motion before the Court is in effect an application to amend a judgment and does not set forth a ground or reason for the modification or amendment asked, and is not an application for a mere formal or clerical amendment based on matters appearing in the record.

Judge McColloch, by Order of November 15, 1946, in this cause, denied a motion by defendant to serve Reconstruction Finance Corporation with a third party complaint and summons, said motion having been opposed by plaintiff.

Finally, even if the power to do so exists, I am reluctant to amend, modify or otherwise disturb orders of Judge Brown and Judge McColloch appearing in the files and records of this case.

Plaintiff's motion to amend that certain Order in the above entitled cause entered on the 15th day of February, 1947, is denied.

Dated: This 6th day of March, 1947.

/s/ ROGER T. FOLEY,

United States District Judge.

[Endorsed]: Filed March 6, 1947. [21]

[Title of District Court and Cause.]

### ORDER

This cause coming on to be heard on the motion of the plaintiff for the allowance of time within which to file its amended complaint naming Reconstruction Finance Corporation as a party plaintiff, and the court having heard the arguments of the parties and being fully advised,

Now, Therefore It Is Considered and Ordered, that the said motion be and the same is hereby denied.

Dated this 11th day of March, 1947.

/s/ ROGER FOLEY,  
Judge.

Endorsed:

Filed March 11, 1947. [22]

---

[Title of District Court and Cause.]

### MOTION

Comes Now Plaintiff above named by and through Henry L. Hess, United States Attorney for the District of Oregon and Victor E. Harr, Assistant United States Attorney and moves the Court for an order of Dismissal without prejudice of the second cause of action of the Plaintiff's amended complaint in the above entitled Court and cause.

Dated at Portland, Oregon this 14th day of March, 1947.

HENRY L. HESS,  
United States Attorney for  
the District of Oregon.

/s/ VICTOR E. HARR,  
Asst. United States Attorney.

United States of America,  
District of Oregon—ss.

Service of the within Motion is hereby accepted within the State and District of Oregon, on the 14th day of March, 1947 by receiving a copy thereof duly certified to as a true and correct copy of the original by Victor E. Harr, Assistant United States Attorney for the District of Oregon.

/s/ MacCORMAC SNOW,  
Attorney for Defendant.

Endorsed:

Filed March 17, 1947. [23]

---

[Title of District Court and Cause.]

### ORDER

This matter coming on to be heard upon motion of plaintiff for an order of dismissal without prejudice of the second cause of action and the Court having considered said motion and being fully advised;

It Is Ordered that the plaintiffs second cause of action in plaintiff's amended complaint in the above entitled Court and cause be and the same is hereby dismissed without prejudice.

Dated at Portland, Oregon, this 17th day of March, 1947.

/s/ CLAUDE McCOLLOCH,  
Judge.

Endorsed:

Filed March 17, 1947. [24]

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

To: Shofner Iron and Steel Works, Defendant  
above named, Portland, Oregon, and Sheppard  
& Phillips, Attorneys for Defendant:

You and each of you will please take notice that the Plaintiff, United States of America, appeals to the Circuit Court of Appeals for the Ninth Circuit, from the Decision of District Judge R. Lewis Brown, rendered February 6, 1947.

HENRY L. HESS,

United States Attorney for  
the District of Oregon.

/s/ VICTOR E. HARR,

Asst. United States Attorney.

United States of America,  
District of Oregon—ss.

Service of the within Notice of Appeal is hereby accepted within the State and District of Oregon, on the 2nd day of May, 1947, by receiving a copy thereof duly certified to as a true and correct copy of the original by Victor E. Harr, Assistant United States Attorney for the District of Oregon.

SHEPPARD & PHILLIPS,  
Of Attorneys for Defendant, by  
DS.

Endorsed:

Filed May 2, 1947. [25]

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[Title of District Court and Cause.]

### ORDER

This Matter coming on to be heard before the undersigned Judge of the above entitled court on the Motion of the Plaintiff to extend the time to and including the 2nd day of July, 1947, within which to file the record on appeal and docket the action, and it appearing to the court that there is good cause and that it is proper to grant the extension of time, and the court being fully advised,

It Is Therefore Ordered that the Plaintiff be, and it is hereby granted an extension of time to and including the 2nd day of July 1947, within which to file an appeal and docket the action.

Dated at Portland, Oregon, this 4th day of June, 1947.

/s/ CLAUDE McCOLLOCH,  
Judge.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED  
UPON ON APPEAL

The United States of America, plaintiff in the above-entitled case, makes the following statement of points to be relied upon on appeal:

1. The District Court erred in dismissing the amended complaint of the United States of America insofar as the first cause of action is concerned.

2. The District Court erred in holding that the United States was not the real party in interest.

3. The District Court erred in holding that the United States was not a proper party to maintain the action.

4. The District Court erred in holding that the Reconstruction Finance Corporation was the real party in interest.

5. The District Court erred in holding that only the Reconstruction Finance Corporation could maintain the action.

Respectfully submitted,

/s/ A. DEVITT VANECH,

Assistant Attorney General,

Washington, D. C.

/s/ HENRY L. HESS,

United States Attorney,

Portland, Oregon.

/s/ ROGER P. MARQUIS,

/s/ WILMA C. MARTIN,

Attys., Department of Justice,

Washington, D. C. [27]

[Affidavit of service by mail attached.]

[Endorsed]: Filed June 19, 1947. [28]



[Title of District Court and Cause.]

DESIGNATION OF RECORD

To: The Clerk of the District Court of the United States for the District of Oregon:

The United States of America, plaintiff, designates the following as the record to be forwarded to the United States Circuit Court of Appeals for the Ninth Circuit, in the appeal of the above-entitled case:

1. Complaint and summons
2. Motion of Defendant to allow service of Reconstruction Finance Corporation
3. Affidavit of Chester A. Sheppard, to support Motion to allow service of Reconstruction Finance Corporation, dated September 12, 1946
4. Order, dated November 15, 1946, denying Defendant's Motion to serve Reconstruction Finance Corporation
5. Amended Complaint
6. Motion, dated December 5, 1946, to dismiss
7. Decision and Order, dated February 6, 1947
8. Order, dated February 13, 1947
9. Motion of Plaintiff, dated February 19, 1947, to amend Order

10. Decision on Motion, dated March 6, 1947, to amend Order

11. Order, dated March 11, 1947, denying Motion for allowance of time to amend complaint

12. Motion of Plaintiff, dated March 14, 1947

13. Order, dated March 17, 1947, dismissing second cause of action in Plaintiff's amended complaint [29]

14. Notice of Appeal by Plaintiff

15. Order, dated June 4, 1947, extending time to docket appeal

16. Designation of Record (District Court)

17. Statement of Points (District Court)

Respectfully submitted,

/s/ A. DEVITT VANECH,

Assistant Attorney General,  
Washington, D. C.

/s/ HENRY L. HESS,

United States Attorney,  
Portland, Oregon.

/s/ ROGER P. MARQUIS,

/s/ WILMA C. MARTIN,

Attys., Department of Justice,  
Washington, D. C.

[Affidavit of service by mail attached.]

[Endorsed]: Filed June 19, 1947. [30]

[Title of District Court and Cause.]

### DOCKET ENTRIES

1946

- Aug. 12 Filed complaint.
- Aug. 13 Issued summons—to Marshal.
- Aug. 19 Filed summons with Marshal's return.
- Aug. 23 Filed stipulation for extension of time to Sept. 16, for defendant to plead.
- Aug. 28 Filed and entered order allowing defendant to Sept. 16, 1946 to plead or answer.
- Sept. 13 Filed defendant's motion to serve Reconstruction Finance Corporation with Third Party Complaint and summons.
- Sept. 23 Record of hearing on above motion.
- Nov. 15 Filed and entered order denying motion to serve Reconstruction Finance Corporation and allowing 10 days for defendant to appear.
- Nov. 25 Filed stipulation and entered order allowing defendant to and including Dec. 5, 1946 to appear.
- Nov. 26 Filed amended complaint.
- Dec. 5 Filed motion of defendant for order of dismissal, or to strike complaint.

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- Jan. 4 Entered order setting hearing on motion of defendant for order of dismissal or to strike complaint for Jan. 15, 1947—10 a.m.
- Jan. 15 Record of hearing on motion of defendant to dismiss or to strike complaint and amended complaint from the files, plain-

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tiff 5 days for brief; defendant 5 days thereafter to file reply brief.

Jan. 20 Filed plaintiff's brief.

Feb. 6 Filed opinion granting motion to dismiss amended complaint as to first cause of action and denying motion to dismiss as to second cause of action.

Feb. 6 Entered order setting for trial on March 18, 1947.

Feb. 7 Entered order reserving all motions and preliminary matters to time of pre-trial and trial.

Feb. 15 Filed and entered order dated Feb. 13, 1947, dismissing first cause of action in amended complaint, and striking first cause of action from files, denying motion to strike original complaint and denying motion to dismiss or strike second cause of action.

Feb. 19 Filed motion to amend order of Feb. 15, 1947.

Feb. 20 Entered order re-setting for trial on March 21, 1947.

Feb. 28 Entered order setting hearing on motion to amend order of Feb. 15, 1947, for March 3, 1947, 10 a.m.

Mar. 3 Record of hearing on motion of plaintiff to amend order of Feb. 15.

Mar. 6 Filed decision on motion to amend order of Feb. 15.

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- Mar. 11 Filed and entered order denying motion of plaintiff for allowance of time to file amended complaint naming Reconstruction Finance Corporation as a party plaintiff.
- Mar. 17 Filed motion for order of dismissal without prejudice as to 2nd cause of action.
- Mar. 17 Filed and entered order of dismissal without prejudice as to 2nd cause of action.
- May 2 Filed appeal by United States.
- June 3 Filed motion for an order extending time.
- June 4 Filed and entered order granting plaintiff to July 2, 1947, to file appeal.
- June 19 Filed designation of record.
- June 19 Filed statement of points to be relied upon on appeal. [32]
- 

In the District Court of the United States  
for the District of Oregon

United States of America,  
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 33 inclusive constitute the transcript of record on appeal from a judgment of said court in a cause therein numbered Civil 3224, in which the United States of America is plaintiff and appellant, and the Shofner Iron and Steel Works is defendant and appellee; that the said transcript has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and

in accordance with the rules of court; that I have compared the foregoing transcript with the original record thereof, and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation as the same appears of record and on file at my office and in my custody.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 27th day of June, 1947.

[Seal]                      LOWELL MUNDORFF,  
Clerk.

By /s/ F. L. BUCK,  
Chief Deputy. [33]

[Endorsed]: No. 11671. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Shofner Iron and Steel Works, a Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed June 30, 1947.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

In the District Court of the United States for the  
District of Oregon

No. 3224—Civil

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

SHOFNER IRON AND STEEL WORKS,  
Defendant.

### DECISION

Defendant moves to dismiss the action or to strike from the files the complaint and amended complaint upon the grounds (a) that neither the complaint or the amended complaint states a claim upon which relief can be granted, and (b) that the plaintiff is not the real party in interest.

As the amended complaint supersedes the original complaint no motion of any kind can now be addressed to the original complaint as it performs no function in the action and the motion is denied in its entirety as to the original complaint.

Defendant contends that the Reconstruction Finance Corporation is the real party in interest and relies upon subdivision (a) of Rule 17 of the Rules of Civil Procedure, which provides where material here "Every action shall be prosecuted in the name of the real party in interest," and Subdivision (b) where material provides "The capacity of a corporation to be sued shall be determined by the law under which it was organized."

The Reconstruction Finance Corporation was organized by an Act of Congress as a corporation, Section 601, et seq., Title 15, U. S. C. A. By Section 604 of the same Title it is specifically given the authority to sue and be sued. Plaintiff alleges in the amended complaint that the Reconstruction Finance Corporation is the owner of the real property; that the defendant now holding possession was originally let into possession of the property by it as its tenant although the period of tenancy has expired; it alleges that it has declared the real property surplus and transferred "jurisdiction" to the War Assets Administration for disposal, and that Administration has the right of present possession, of necessity, so that it may dispose of the property. It does not follow of necessity that the War Assets Administration must possess the property physically in order to dispose of it any more so than a real estate broker must physically possess the home of its client in order to dispose of the home. However that may be, it is apparent that the War Assets Administration does not have possession of the property and cannot get it except as a result of litigation that it itself cannot undertake in its own name, and the question presented is, who is the party properly to carry forward the litigation, in other words the real party in interest?

The Reconstruction Finance Corporation and the United States are not the same or the same entities.

The Reconstruction Finance Corporation is a corporate agency of the government which is its sole stockholder, 15 U. S. C. A. 601. It is managed



by a Board of Directors appointed by the President, by and with the advice and consent of the Senate. It has wide powers and conducts financial operations on a vast scale. While it acts as a governmental agency in performing its functions, its transactions are akin to those of private enterprises, but it is not the sovereign and does not possess the immunities that the sovereign does possess, *Reconstruction Finance Corporation v. Menihan Corp., et al.*, 312 U. S. 81. It is an entity in law, separate and apart from the United States.

Congress must have contemplated, in giving to the corporation the vast powers that it gave to it in transacting its multifarious business, that in so doing it would probably acquire causes of action against others and for that reason it gave the corporation the power to sue. Equally, it was within the contemplation of Congress, that in transacting the multifarious business it had a right to transact, it might give to others a cause of action against it, and gave to those others the right to sue the corporation, each right being a valuable right to the one possessing it under the act of Congress. It thus could not be contended by the defendant, if the action were brought in the name of the Reconstruction Finance Corporation, that the United States was the proper party in interest and the action should be maintained in its name. Equally, if one possessing a cause of action against the Reconstruction Finance Corporation should sue that corporation the corporation could not well move to dismiss the action on the ground that the United States and not

the corporation was the real party in interest as defendant. I do not believe the Congress, in giving to the corporation the power to sue, in effect gave to it an election to maintain the action in its own name, or in the name of the United States, as it might appear in each particular action to be to the particular advantage for some reason of the corporation to sue in the name of the United States rather than in its own name. Ordinarily causes of action possessed by the Reconstruction Finance Corporation are its causes of action and not causes of action of the United States or of the United States and the corporation jointly, and as to those causes of action and except where special circumstances appear from the pleading, which do not appear here, the corporation is the real party in interest and not the United States. To hold otherwise might deny a defendant a valuable right which it might have as a party litigant against the Reconstruction Finance Corporation if the action were brought in its name which it could not or would not have if the action were brought in the name of the United States alone. The case of *Reconstruction Finance Corporation v. Menihan Corp.*, *supra*, is an illustration, for there the defendant was successful and being successful was entitled to a money judgment for its costs that it would not have been entitled to had the action been permitted to be maintained in the United States.

It necessarily follows that the motion made in so far as the first cause of action is concerned is meritorious and ought to be sustained on both of its grounds. The United States, not being the real

party in interest, of course cannot state a claim upon which relief can be granted.

As to the second cause of action, it is alleged that the defendant leased the real property to the plaintiff from the 28th day of September, 1943, to and including the 23rd day of March, 1963; that the plaintiff is entitled to the possession of the property and that defendant unlawfully withholds possession of the property from the plaintiff. The question presented being that the plaintiff is not the real party in interest, as the transaction was had, as appears from the second cause of action, between the plaintiff and the defendant and not between the defendant and the Reconstruction Finance Corporation, there is nothing in the allegations of the second cause of action that leads to the conclusion that anyone else except the plaintiff is or could be the real party in interest and the motion to dismiss as to the second cause of action ought to be denied.

It Is Therefore Ordered that the motion to dismiss the amended complaint is granted in so far as the first cause of action is concerned and denied as to the second cause of action.

Done and dated this 6th day of February, 1947.

R. LEWIS BROWN,

United States District Judge.

[Endorsed]: Filed February 6, 1947.

United States of America,  
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing copy of Decision in Cause No. Civil 3224, United States of America vs. Shofner Iron and Steel Works has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this 11th day of August, 1947.

[Seal]                      LOWELL MUNDORFF,  
Clerk,  
By /s/ F. L. BUCK,  
Chief Deputy Clerk.

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[Endorsed]: No. 11671. United States Circuit Court of Appeals for the Ninth Circuit. United States of America. Appellant, vs. Shofner Iron and Steel Works, a Corporation, Appellee. Supplemental Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed August 13, 1947.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11671

UNITED STATES OF AMERICA,  
Appellant,  
vs.

SHOFNER IRON AND STEEL WORKS,  
Appellee.

STATEMENT OF POINTS AND DESIGNA-  
TION OF PORTIONS OF RECORD TO BE  
PRINTED

The United States of America, appellant in the above-entitled case, adopts the statement of points filed in the district court as the statement of points to be relied upon in this Court and desires that the whole of the record as filed and certified be printed in its entirety.

Respectfully submitted,

/s/ A. DEVITT VANECH,  
Assistant Attorney General,  
Washington, D. C.

/s/ ROGER P. MARQUIS,  
/s/ WILMA C. MARTIN,  
Attys., Department of Justice,  
Washington, D. C.

[Endorsed]: Filed July 11, 1947.



ORIGINAL

No. 11671

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**In the United States Circuit Court of Appeals  
for the Ninth Circuit**

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**UNITED STATES OF AMERICA, APPELLANT**

*v.*

**SHOFNER IRON AND STEEL WORKS, A CORPORATION,  
APPELLEE**

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**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF OREGON**

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**BRIEF FOR THE UNITED STATES**

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**A. DEVITT VANECH,**  
*Assistant Attorney General.*

**HENRY L. HESS,**  
*United States Attorney, Portland, Oregon.*

**ROGER P. MARQUIS,  
WILMA C. MARTIN,**  
*Attorneys, Department of Justice, Washington, D. C.*

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**FILED**

SEP 30 1947





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# In the United States Circuit Court of Appeals for the Ninth Circuit

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No. 11671

UNITED STATES OF AMERICA, APPELLANT

v.

SHOFNER IRON AND STEEL WORKS, A CORPORATION,  
APPELLEE

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*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF OREGON*

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**BRIEF FOR THE UNITED STATES**

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**OPINION BELOW**

The opinion of the district court (R. 39-43) is reported at 71 F. Supp. 161.

**JURISDICTION**

This is a suit brought by the United States to recover possession of property wrongfully held by the defendant (R. 16-19). The jurisdiction of the district court rested upon Section 24 (1) of the Judicial Code, 28 U. S. C. sec. 41 (1). By a decision and order entered February 6, 1947, the trial court granted a motion to dismiss the complaint as to the first cause of action (R. 43) and on February 15,

1947, an order was entered dismissing that cause of action (R. 24). Notice of appeal was filed May 2, 1947 (R. 30-31). The jurisdiction of this Court is invoked under Section 128 of the Judicial Code as amended, 28 U. S. C. sec. 225 (a).

#### QUESTION PRESENTED

Whether the United States may maintain a suit to recover possession of property owned by and formerly under the jurisdiction of the Reconstruction Finance Corporation which has been declared surplus to the needs of the Reconstruction Finance Corporation and transferred to the jurisdiction of the War Assets Administration under the Surplus Property Act..

#### STATUTES AND EXECUTIVE ORDER INVOLVED

The pertinent provisions of the Surplus Property Act of October 3, 1944, 58 Stat. 765, c. 479 as amended, 50 U. S. C. App. Supp. V, secs. 1611-1646; the Act of September 18, 1945, 59 Stat. 533, c. 368, secs. 1-2, 50 U. S. C. App. Supp. V, secs. 1614a-1614b; and of Executive Order No. 9689, 11 Fed. Reg. 1265 (1946), are set out in the Appendix, *infra*, pp. 16-22.

#### STATEMENT

This is a suit brought by the United States to recover possession of certain property, and the facts of the case, as they appear in the pleadings, may be summarized as follows:

In September 1942, the Defense Plant Corporation entered into a lease agreement with the Shofner Iron and Steel Works, whereby it leased certain described property to Shofner (R. 16-17). At the time of the

agreement the property was owned by Shofner, but in accordance with the terms of the lease Defense Plant acquired title from Shofner on January 30, 1943 (R. 16, 18). On July 1, 1945, the Reconstruction Finance Corporation succeeded to all right, title and interest of Defense Plant in the land and all rights of Defense Plant under the lease (R. 18). RFC terminated the lease in accordance with its terms effective as of December 5, 1945 (R. 18). Thereafter RFC consented to Shofner's remaining in possession until May 15, 1946 (R. 18). Since that time Shofner has remained in possession without authority, right, title or interest (R. 18). On May 24, 1946, RFC declared the premises and facilities surplus and transferred jurisdiction of the property to the War Assets Administration pursuant to the Surplus Property Act of October 3, 1944, 58 Stat. 765, as amended and regulations thereunder (R. 18-19). On August 12, 1946, a suit was instituted in the name of the United States by the filing of a complaint which set forth the above facts (R. 2-5) and, alleging the right of the United States to possession and Shofner's unlawful and wrongful withholding of possession, prayed for judgment against Shofner for possession of the property (R. 5).

On September 13, 1943, Shofner moved for leave to make RFC a third-party defendant so that it might assert a counter-claim against RFC (R. 9). By affidavit in support of the motion Shofner stated that Defense Plant had constructed a foundry for the production of steel castings on the premises described in the complaint and leased to Shofner; that in the

latter part of December, 1944, Defense Plant agreed to make certain changes in its foundry plant for the purpose of increasing production, but such changes were not made; that Shofner's claim against RFC arose out of the failure of Defense Plant to make the changes which allegedly resulted in damage to Shofner and that this and other rights and claims against RFC could not be determined in the suit without the presence of RFC (R. 10-14). The motion was denied on November 15, 1946, by Judge McColloch (R. 15).

On November 26, 1946, the United States filed an amended complaint setting forth two causes of action, the first being the same cause alleged in the original complaint (R. 16-21). For a second cause of action, the United States alleged that Shofner had leased certain other described property to the United States for twenty years, that the United States had the right to possession under the lease and Shofner unlawfully and wrongfully withheld possession (R. 19-21). The relief prayed for was possession of the described properties (R. 21).

Shofner moved on December 5, 1946, for a dismissal of the cause on the ground that neither the complaint nor the amended complaint stated a claim on which relief could be granted and that the United States was not the real party in interest (R. 23). On February 6, 1947, District Judge R. Lewis Brown granted the motion to dismiss the amended complaint insofar as it related to the first cause of action on the ground that RFC and not the United States was the real party in interest (R. <sup>39-43</sup>39-43). The motion to dismiss was de-

nied as to the second cause of action because it did not appear from the allegations in the amended complaint that anyone other than the United States was or could be the real party in interest (R. ———).<sup>1</sup> An order dismissing the first cause of action was entered February 15, 1947 (R. 24). On February 19, 1947, the Government moved to amend the order so as to allow it time within which to file an amended complaint naming RFC as a party plaintiff, but the motion was denied on March 6, 1947, by Judge Foley (R. 25–27). Thereafter, this appeal was taken (R. 30).<sup>2</sup>

#### SPECIFICATION OF ERRORS

The district court erred—

1. In dismissing the amended complaint of the United States as to the first cause of action.
2. In holding that the United States was not the real party in interest.
3. In holding that the United States was not a proper party to maintain the action.
4. In holding that RFC was the real party in interest.
5. In holding that only RFC could maintain the action.

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<sup>1</sup> Inasmuch as the status of the United States in the second cause of action was in fact no different from its status in the first cause, the second cause of action was subsequently dismissed without prejudice upon motion by the Government (R. 28–30).

<sup>2</sup> The notice of appeal referred to the order of February 6, 1947, granting the motion to dismiss. That order was implemented by the formal order of dismissal on February 15, 1947 (R. 24).

## ARGUMENT

**The United States may maintain a suit to recover possession of property declared surplus by RFC against a defendant wrongfully in possession**

A. *The United States may maintain the suit by virtue of the provisions of the Surplus Property Act.*—The property here involved was acquired by Defense Plant Corporation and leased to Shofner to provide facilities for the production of steel castings needed in the prosecution of the war (cf. R. 10–13). Defense Plant was a corporation created by RFC under authority of Section 5 (d) of the Reconstruction Finance Corporation Act, as amended by Act of June 25, 1940, 54 Stat. 572, c. 427, sec. 5, as amended, 15 U. S. C., sec. 606b (3), for the purpose (among other things) of acquiring real estate to build or expand plants for the manufacture of arms, ammunition and implements of war in aid of the national defense program. 6 Fed. Reg. 2971 (1941). Stock in the Defense Plant Corporation was wholly owned by RFC, the stock of which, in turn, is wholly owned by the United States. 6 Fed. Reg. 2971 (1941); RFC Act, sec. 2, as amended, 15 U. S. C. sec. 602. On July 1, 1945, Defense Plant Corporation was dissolved and all its functions, powers, duties, assets, liabilities, etc., were transferred to RFC. Joint Resolution of June 30, 1945, c. 215, 59 Stat. 310, 15 U. S. C. Supp. V, sec. 606b, note. Thus RFC succeeded to all right, title, interest and obligations of Defense Plant with reference to the property here involved.



As alleged in the Government's amended complaint, RFC terminated Shofner's lease to the property in accordance with its terms effective December 5, 1945 (R. 18). As further alleged, Shofner's right to possession was extended by agreement to May 15, 1946 (R. 18) and since that time Shofner has unlawfully and wrongfully withheld possession (R. 19). On May 24, 1946, RFC declared the premises and facilities surplus and transferred jurisdiction to the War Assets Administration pursuant to the Surplus Property Act and regulations thereunder (R. 18-19). Since the War Assets Administration is an administrative agency of the Government and not a Government corporation having the right to sue and be sued, this suit to recover possession of the property was instituted in the name of the United States. The court below dismissed the suit on the theory that RFC, a Government corporation having the right to sue and be sued in its own name, was the real party in interest (R.<sup>41-42</sup>). We submit that this ruling was plainly erroneous because it ignored the provisions of the Surplus Property Act.

A great deal of property was acquired during the war by various Government agencies, including Government corporations, for use in prosecution of the war. Since various properties from time to time were no longer needed for the purposes for which they were acquired and in anticipation of the termination of the war, the Surplus Property Act of October 3, 1944, 58 Stat. 765, c. 479, was passed to create a central Government agency to facilitate and regulate the orderly

disposal of surplus property in accordance with certain objectives laid down by Congress. The Act applied to property of Government corporations such as RFC and Defense Plant. Surplus Property Act, sec. 3, 50 U. S. C. App. Supp. V, sec. 1612. The original Act created a Surplus Property Board to have general supervision and direction over the care and disposition of surplus property. Surplus Property Act, secs. 5-6, 50 U. S. C. App. Supp. V, secs. 1614-1615. Among its duties was the designation of other Government agencies as agencies to dispose of property, i. e. "disposal agencies." Id. Section 10, 50 U. S. C. App. Supp. V, sec. 1619. Thus, property declared surplus by the Navy Department, depending on its type, might be disposed of either by the Treasury Department, the State Department or the Department of the Interior. By the Act of September 18, 1945, c. 368, secs. 1-2, 50 U. S. C. App. Supp. V, secs. 1614a-1614b, the Surplus Property Administration, headed by the Surplus Property Administrator, was created, the Surplus Property Board was abolished and its functions transferred to the Surplus Property Administrator. The activities of the newly created agency were, like those of the Board, confined to policy making functions and disposal functions were carried out by the disposal agencies designated by the Board or its successor, the Surplus Property Administrator. However, effective March 25, 1946, both the policy making functions and the disposal functions, with exceptions not here important, were consolidated in one agency, the War Assets Administration, headed by the War

Assets Administrator. Executive Order No. 9689, 11 Fed. Reg. 1265 (1946). Consequently, the War Assets Administration is now vested with the powers and responsibilities of disposing of surplus property of the type involved here.<sup>3</sup>

The Surplus Property Act, as now administered, requires Government agencies owning property which is surplus to their needs and responsibilities to report such property to the War Assets Administration. Section 11, 50 U. S. C. App. Supp. V, sec. 1620. Whenever any surplus property is reported, the disposal agency (in this case, the War Assets Administration) is given the responsibility and authority to dispose of it and to care for and handle it pending its disposition. Surplus Property Act, section 11 (d), 50 U. S. C. App. Supp. V, sec. 1620 (d).<sup>4</sup> Under the statute the War Assets Administration is authorized to "dispose of such property by sale, exchange, lease or transfer" and may execute or require any owning agency to execute such documents as it deems necessary to transfer title or take such other action as it deems necessary or proper to transfer or dispose of property or

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<sup>3</sup> For the succession of agencies designated to dispose of industrial real property, under which classification the property in this case falls, see Surplus Property Administration Reg. No. 1, sec. 8301.2 (b) (2), 10 Fed. Reg. 14064; 11 Fed. Reg. 408 (1946); Executive Order No. 9689, 11 Fed. Reg. 1265 (1946); see also War Assets Administration Reg. No. 1, sec. 8301.2 (g) (2), 11 Fed. Reg. 7971 (1946).

<sup>4</sup> "Care and handling" is defined by section 3 (g), 50 U. S. C. App. Supp. V, sec. 1612 (g), as including "completing, repairing, converting, rehabilitating, operating, maintaining, preserving, protecting, insuring, storing, packing, handling and transporting" surplus property.

otherwise carry out the provisions of the Act. Surplus Property Act, section 15, 50 U. S. C. App. Supp. V, 1624.

Since RFC has declared the property here involved surplus to its needs and responsibilities, it must be disposed of by War Assets Administration. While RFC still has the technical legal title, the responsibility and authority for disposing of the property and the care and handling of the property pending disposal are by the terms of the Act vested in the War Assets Administration. The court below stated (R. —): “It does not follow of necessity that the War Assets Administration must possess the property physically in order to dispose of it any more so than a real estate broker must physically possess the home of its client in order to dispose of the home”. But, the ability to deliver possession to a purchaser is indispensable to carrying out the responsibility and authority vested in War Assets for disposing of surplus property. And, even more important, the War Assets Administration must not only dispose of the property, but must administer it from the time it is declared surplus to the time it is sold. Obtaining possession of surplus property wrongfully withheld is obviously a necessary adjunct to the responsibility for the care and handling of surplus property pending its disposal. It is clear that Congress intended that the War Assets Administration should have possession of all surplus government property, since the Congressional definition of “care and handling” is all embracing and includes many functions which could not be

performed without taking possession such as “completing”, “converting”, “rehabilitating” and “operating” the property. Of direct application to the present case is the inclusion in the definition of the functions of “maintaining, preserving, protecting” the property. Being thus charged with the duty of excluding vandals, trespassers and other unauthorized persons from the premises, the War Assets Administration was obviously entitled to recover possession from the defendants. Since War Assets is an administrative agency its litigation is conducted by and in the name of the United States. Accordingly, it is submitted that this suit was properly instituted in the name of the United States.

B. *The United States may maintain the suit to assert rights arising out of the transactions of one of its wholly owned corporations.*—The decision of the court below is based upon the fact that RFC may “sue and be sued” in its own name. The court concluded that RFC is a separate and distinct entity akin to a private corporation, and therefore, that a cause of action of RFC is not a cause of action of the United States (R. 41).

But the fact that RFC might have maintained the action does not prove that the United States cannot also bring the suit. Neither the suability of the Government corporation nor its power to sue deprives that entity of its status as an agency of the United States (*Cherry Cotton Mills v. United States*, 327 U. S. 536, 539 (1946); cf. *Defense Supplies Corp. v. United States Lines Co.*, 148 F. 2d 311 (C. C. A. 2,

1945), certiorari denied 326 U. S. 746) or abridges in any degree the substantial rights of the United States. The mere fact that the form of a wholly owned corporation is employed does not mean, as the trial court seemed to think (R. —), that the agency is to be treated as any private corporation and the governmental interests are to be ignored. As the Supreme Court said in the *Cherry Cotton Mills* case, *supra* (a case in which the United States upon being sued for a tax refund was permitted to recover on a counterclaim for indebtedness due RFC) (p. 539):

Its [RFC's] directors are appointed by the President and confirmed by the Senate; its activities are all aimed at accomplishing a public purpose; all of its money comes from the Government; its profits, if any, go to the Government; its losses the Government must bear. That the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is, an agency selected by Government to accomplish purely governmental purposes.

For this reason, the courts have uniformly held that in addition to the corporation's right to sue, the United States may sue in its own name on claims arising out of transactions with such corporations. *Erickson v. United States*, 264 U. S. 246 (1924) (Spruce Corporation); *United States v. Skinner & Eddy Corp.*, 35 F. 2d 889, 892 (C. C. A. 9, 1929) (Fleet Corporation); *Russell Wheel & Foundry Co. v. United States*, 31 F. 2d 826, 828 (C. C. A. 6, 1929) (same); *United States v. Czarnikow-Rionda Co.*, 40

F. 2d 214, 215–216 (C. C. A. 2, 1930), certiorari denied 282 U. S. 844 (same); *United States v. Ascher*, 49 F. Supp. 257 (S. D. Calif. 1943) (RFC); *United States v. Arthur*, 23 F. Supp. 537 (S. D. N. Y. 1937) (same); *United States v. Freeman*, 21 F. Supp. 593, 598 (D. Mass. 1937) (same); *RFC v. Graydon*, 16 F. Supp. 765 (E. D. S. C. 1936) (same); *RFC v. Krauss*, 12 F. Supp. 44 (D. N. J. 1935) (same); *United States v. Stein*, 48 F. 2d 626 (N. D. Ohio, 1921) (U. S. Housing Corporation); cf. *United States v. Walter*, 263 U. S. 15, 18 (1923) (Fleet Corporation). The same principle has been applied in other situations. Thus the property of such corporation is immune from state taxation, unless Congress specifically waives the immunity. (*Clallam County v. United States*, 263 U. S. 341 (1923); *King County, Wash. v. United States Ship. Board E. F. Corp.*, 282 Fed. 950 (C. C. A. 9, 1922); *Baltimore Nat. Bank v. Tax Comm'n*, 297 U. S. 209 (1936); *Owensboro National Bank v. Owensboro*, 173 U. S. 664, 668–669 (1899); see RFC Act, sec. 10, as amended, 15 U. S. C. Supp. V, sec. 610; 6 Fed. Reg. 2971 (1941)). Likewise, the corporation enjoys the privilege of receiving a pledge of assets from a national bank to secure deposits of its funds, the right to reduced telegraph rates and similar rights. *Inland Waterways Corp. v. Young*, 309 U. S. 517 (1940); *Emergency Fleet Corp. v. Western Union*, 275 U. S. 415 (1928); *United States Grain Corp. v. Phillips*, 261 U. S. 106 (1923).

The trial court relied heavily (R. 42) on the fact that if suit were brought by RFC it would be

subject to liability for costs if it were unsuccessful. *Reconstruction Finance Corp. v. Menihan Corp.*, 312 U. S. 81 (1941). But this argument has been specifically rejected by the Supreme Court in *Cherry Cotton Mills v. United States*, 327 U. S. 536 (1946) where the court held (pp. 539-540) that the *Menihan* and similar cases did not limit the power of the United States to assert a debt due RFC as a counterclaim. And, while this point was not specifically mentioned, the many cases cited above, pp. 12-13, holding that the United States could sue on a claim of a government corporation necessarily reject the argument.

It is submitted, therefore, that the United States was a proper party to institute this suit to recover possession of federally-owned property. This is not to say that the RFC or the RFC and the United States together could not bring a similar suit. In fact, after dismissal of the present action, another suit was filed by the United States and RFC. However, the appellee here is asserting that the present case is *res judicata* and therefore the second suit is barred. While it is not believed that this claim of *res judicata* has merit, the present appeal is prosecuted to avoid any necessity of deciding that question and especially to avoid the delay in obtaining possession which would attend litigation of the question.

#### CONCLUSION

The trial court erred in holding that the United States may not sue in its own name to recover possession of surplus property of a Government-owned



corporation. The right to maintain such a suit can be sustained either under the provisions of the Surplus Property Act or under the well-established principle that the United States may sue to protect its interests in claims arising out of the transactions of its wholly owned corporations. It is accordingly submitted that the order dismissing the amended complaint as to the first cause of action be reversed with instructions to proceed to the merits of the case.

Respectfully.

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AUGUST 1947.

## A P P E N D I X

The pertinent provisions of the Surplus Property Act of October 3, 1944, 58 Stat. 765, as amended, 50 U. S. C. App. Supp. V, secs. 1611-1646, are as follows:

SEC. 3 [50 U. S. C. App. Supp. V, sec. 1612].  
As used in this Act—(a) The term “Government agency” means any executive department, board, bureau, commission, or other agency in the executive branch of the Federal Government, or any corporation wholly owned (either directly or through one or more corporations) by the United States.

(b) The term “owning agency,” in the case of any property, means the executive department, the independent agency in the executive branch of the Federal Government, or the corporation (if a Government agency), having control of such property otherwise than solely as a disposal agency.

(c) The term “disposal agency” means any Government agency designated under section 10 to dispose of one or more classes of surplus property.

(d) The term “property” means any interest, owned by the United States or any Government agency, in real or personal property, of any kind, wherever located, but does not include \* \* \*

(e) The term “surplus property” means any property which has been determined to be surplus to the needs and responsibilities of the owning agency in accordance with section 11. \* \* \*

\* \* \* \* \*

(g) The term “care and handling” includes completing, repairing, converting, rehabilitating, operating, maintaining, preserving, protect-

ing, insuring, storing, packing, handling, and transporting, and, in the case of property which is dangerous to public health or safety, destroying, or rendering innocuous, such property.

\* \* \* \* \*

SEC. 5. (a) [50 U. S. C. App. Supp. V, sec. 1614 (a)]. There is hereby established in the Office of War Mobilization, and in its successor, a Surplus Property Board (hereinafter called the "Board"), which shall be composed of three members, each of whom shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of \$12,000 per annum.

\* \* \* \* \*

SEC. 6. (50 U. S. C. App. Supp. V, sec. 1615); The activities of the Board shall be coordinated with the programs of the armed forces of the United States in the interests of the war effort. Until peace is concluded the needs of the armed forces are hereby declared and shall remain paramount. The Board shall have general supervision and direction, as provided in this Act, over (1) the care and handling and disposition of surplus property, and (2) the transfer of surplus property between Government agencies.

\* \* \* \* \*

SEC. 10. (a) [50 U. S. C. App. Supp. V, sec. 1619 (a)]. Except as provided in subsection (b) of this section, the Board shall designate one or more Government agencies to act as disposal agencies under this Act. In exercising its authority to designate disposal agencies, the Board shall assign surplus property for disposal by the fewest number of Government agencies practicable and, so far as it deems feasible, shall centralize in one disposal agency responsibility for the disposal of all property of the same type or class.

\* \* \* \* \*

SEC. 11. (a) [50 U. S. C. App. Supp. V, sec. 1620]. Each owning agency shall have the duty and responsibility continuously to survey the property in its control and to determine which of such property is surplus to its needs and responsibilities.

(b) Each owning agency shall promptly report to the Board and the appropriate disposal agency all surplus property in its control which the owning agency does not dispose of under section 14.

(c) Whenever in the course of the performance of its duties under this Act, the Board has reason to believe that any owning agency has property in its control which is surplus to its needs and responsibilities and which it has not reported as such, the Board shall promptly report that fact to the Senate and House of Representatives. Each owning agency and each disposal agency shall submit to the Board (1) such information and reports with respect to surplus property in the control of the agency, in such form, and at such reasonable times, as the Board may direct; (2) such information and reports with respect to other property in the control of the agency, to such extent, and in such form, as the Board may direct and as the agency deems consistent with national security.

(d) When any surplus property is reported to any disposal agency under subsection (b) of this section, the disposal agency shall have responsibility and authority for the disposition of such property, and for the care and handling of such property pending its disposition, in accordance with regulations prescribed by the Board. Where the disposal agency is not prepared at the time of its designation under this Act to undertake the care and handling of such surplus property the Board may postpone the responsibility of the agency to assume its duty for care and handling for such period as the

Board deems necessary to permit the preparation of the agency therefor.

(e) The Board shall prescribe regulations necessary to provide, so far as practicable, for uniform and wide public notice concerning surplus property available for sale, and for uniform and adequate time intervals between notice and sale so that all interested purchasers may have a fair opportunity to buy.

\* \* \* \* \*

SEC. 15. (a) [50 U. S. C. App. Supp. V. sec. 1624]. Notwithstanding the provisions of any other law but subject to the provisions of this Act, whenever any Government agency is authorized to dispose of property under this Act, then the agency may dispose of such property by sale, exchange, lease, or transfer, for cash, credit, or other property, with or without warranty, and upon such other terms and conditions, as the agency deems proper: \* \* \*

(b) Any owning agency or disposal agency may execute such documents for the transfer of title or other interest in property or take such other action as it deems necessary or proper to transfer or dispose of property or otherwise to carry out the provisions of this Act, and, in the case of surplus property, shall do so to the extent required by the regulations of the Board.

The pertinent provisions of the Act of September 18, 1945, 59 Stat. 533, c. 368, secs. 1-2, 50 U. S. C. App. Supp. V, sec. 1614a-1614b are as follows:

That there is hereby established in the Office of War Mobilization and Reconversion a Surplus Property Administration which shall be headed by a Surplus Property Administrator. The Administrator shall be appointed by the President by and with the advice and consent of the Senate and shall receive compensation

at the rate of \$12,000 per year. The term of office of the Administrator shall be two years.

SEC. 2. (a) Effective at the time the Surplus Property Administrator first appointed under this Act qualifies and takes office, the Surplus Property Board created by section 5 of the Surplus Property Act of 1944 is abolished, all of its functions are transferred to, and shall be exercised by, the Surplus Property Administrator, and all of its personnel (except the members thereof), records, and property (including office equipment) are transferred to, and shall become, respectively, the personnel, records, and property of the Surplus Property Administration.

\* \* \* \* \*

(c) All regulations, policies, determinations, authorizations, requirements, designations, and other actions of the Surplus Property Board, made, prescribed, or performed before the transfer of functions provided by subsection (a) of this section shall, except to the extent rescinded, modified, superseded, or made inapplicable by the Surplus Property Administrator, have the same effect as if such transfer had not been made; but functions vested in the Surplus Property Board by any such regulation, policy, determination, authorization, requirement, designation, or other action shall, insofar as they are to be exercised after the transfer, be considered as vested in the Surplus Property Administrator.

\* \* \* \* \*

The pertinent provisions of Executive Order No. 9689, 11 Fed. Reg. 1265 (1946) are as follows:

#### CONSOLIDATION OF SURPLUS PROPERTY FUNCTIONS

Whereas the Surplus Property Administration has now substantially completed the performance of its policy-making functions, the

War Assets Corporation is now vested with the major part of domestic surplus property disposal, and the State Department is now vested with the major part of foreign surplus property disposal; and

Whereas, after a reasonable period in which to make necessary administrative arrangements, it will be feasible and desirable to establish a War Assets Administration as a separate agency directly responsible to the President to exercise consolidated functions relating to the disposal of domestic surplus property;

Now therefore, by virtue of the authority vested in me by the Constitution and Statutes, including Title I of the First War Powers Act, 1941 (55 Stat. 838), and as President of the United States, it is hereby ordered as follows:

1. The functions of the Surplus Property Administrator and of the Surplus Property Administration are hereby transferred, except as otherwise provided herein, to the chairman of the board of directors of the War Assets Corporation, and to the War Assets Corporation, respectively, and the Surplus Property Administration shall be deemed merged into and consolidated with the War Assets Corporation.

2. All functions of the Surplus Property Administrator and the Surplus Property Administration which relate to surplus property located outside the continental United States, Hawaii, Alaska (including the Aleutian Islands), Puerto Rico, and the Virgin Islands are transferred to the Secretary of State and the Department of State, respectively.

3. Effective March 25, 1946 (a) there shall be established, in the Office for Emergency Management of the Executive Office of the President, a War Assets Administration at the head of which there shall be a War Assets Administrator, who shall be appointed by the

President by and with the advice and consent of the Senate, and who shall receive a salary at the rate of \$12,000 per annum unless the Congress shall otherwise provide, and (b) the functions of the War Assets Corporation relative to surplus property and of the Chairman of the board of directors of the War Assets Corporation relative to surplus property shall be transferred to the War Assets Administrator.

4. There shall be transferred to the agencies to which functions are transferred by this order so much as the Director of the Bureau of the Budget shall determine to relate primarily to such functions, respectively, of the records, administrative property, personnel, and funds of the Surplus Property Administration, the Office of War Mobilization and Reconversion, the Reconstruction Finance Corporation, and the War Assets Corporation. All authorizations, commitments, or other obligations incurred as a disposal agency by the Reconstruction Finance Corporation or by the War Assets Corporation under the Surplus Property Act of 1944 shall be transferred to the War Assets Administration upon its establishment.

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**In the United States**  
**CIRCUIT COURT OF APPEALS**  
**for the Ninth Circuit**

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UNITED STATES OF AMERICA,

*Appellant,*

v.

SHOFNER IRON AND STEEL WORKS,  
a corporation,

*Appellee.*

Appeal from the District Court of the United States  
for the District of Oregon.

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**APPELLEE'S BRIEF**

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FILED

OCT 16 1947

PAUL P. O'BRIEN,

CLERK



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**In the United States**  
**CIRCUIT COURT OF APPEALS**  
**for the Ninth Circuit**

---

UNITED STATES OF AMERICA,

*Appellant,*

v.

SHOFNER IRON AND STEEL WORKS,  
a corporation,

*Appellee.*

---

Appeal from the District Court of the United States  
for the District of Oregon.

---

**APPELLEE'S BRIEF**

---

**STATEMENT**

Taking the amended complaint by its four corners the allegations of the first cause of action (R. 16-18) are these:

The Appellee, Shofner Iron and Steel Works, originally owned and was in possession of certain real estate described as "Tract I", situated in Multnomah County, Oregon. In September, 1942, Appellee leased this land from Defence Plant Corporation and remained in posses-

sion thereof. On January 30, 1943, Appellee deeded the land to Defence Plant Corporation and still remained in possession under the lease. Reconstruction Finance Corporation succeeded to the interests of DPC and cancelled the lease. Shofner remained in possession and is still in possession. RFC declared the land surplus under the Surplus Property Act. Appellee, it is said, wrongfully withholds possession from the United States.

The allegations of the second cause of action are:

Shofner was in possession of other real estate in Multnomah County, Oregon, described as "Parcel 1" and "Parcel 2". On September 28, 1943, Appellee leased this land to the United States for a term extending until 1963, but remained in possession. The Government has complied with all conditions of the lease. Appellee is still in possession and unlawfully withholds possession from Appellant, the United States.

Both causes of action concern Oregon real estate. In both, possession of the land in Appellee is alleged to be unlawful as against the United States. In the first cause of action title is alleged to be in RFC, and in the second it is said to be in Appellee. In neither is title alleged to be in the United States.

In the first the relation of landlord and tenant between RFC and Appellee is alleged to have ceased; in the second that relation between Appellee and the Government is said still to persist.

In the first cause of action the United States does not claim to have received any transfer of RFC's title

to the land. The only claim is that RFC transferred "jurisdiction over said premises" to War Assets Administration.

In the second cause of action it is not alleged that the lease from the Appellee to the Appellant was declared surplus. The Surplus Property Act is not involved here.

In both causes of action the United States seeks possession only. In neither does the Government seek to try the title. In the second cause of action it does not claim title, but claims only leasehold rights. In the first it alleges title in RFC, but does not allege that that title has been or is denied or threatened, nor does it seek to quiet the RFC's title.

*The action as a whole is one which in Oregon is called forcible entry and detainer.*

## ARGUMENT

The grounds upon which the United States seeks possession of the property described in the two causes of action are, (1) Surplus Property Act, and (2) under the claim that the United States can sue in its own name on any cause of action belonging to RFC.

Neither of these grounds applies to the second cause of action. The leasehold recited therein is not alleged to have been declared surplus under the Surplus Property Act, and the leasehold is alleged to be in the name of the United States. Moreover, Appellee's motion to dismiss did not reach the second cause of action. We

so stated to Judge Brown, and in his decision (Sup. R. ....) he denied Appellee's motion so far as the second cause of action is concerned. The United States then applied for and took a dismissal of the second cause of action without prejudice (R. 28-29). The Government has not appealed (R. 30) and cannot appeal from its own dismissal order. The second cause of action is not before this Appellate Court.\*

We address ourselves to the first cause of action. The cases recited by Appellant on Pages 12 and 13 of its brief are not in point. They hold that where a debt or obligation exists in favor of a government owned corporation and against a citizen, either the United States alone or the United States and its corporation can bring suit thereon. But these cases are all for money demands. None of them are for the recovery of possession of real property; none of them are based on the relation of landlord and tenant such as appears in the first cause of action. None are grounded on state statutes.

Only one case related to real estate, namely *United States v. Stein*, (N.D. Oh. Ed.) 48 Fed. (2) 626. Here the United States sought to quiet title to real estate and also asked an injunction against continuing trespasses thereon. During the first World War, the United States, through the Secretary of Labor, requisitioned the real property in question. This was after the United States Housing Corporation had contracted to buy the property

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\*This Court may well wonder why, in the middle of the war, when DPC appeared to be handling the plant situation with regard to the Appellee, the United States should have taken a lease in its own name to a portion of Appellee's plant. The answer is it did not; the second cause of action is untrue. This lease ran to DPC, not to the Government.



and the owner had refused to comply with his contract. Following the requisition, the owner exhibited recalcitrance and trespassed upon the property and attempted to convey the title, and otherwise impeded the Government. The United States had its decree by force of the Ohio law.

The case bears no relation to that alleged in the first cause of action or to any of the other cases cited by the Government in its brief. The first cause of action is a claim of a landlord against a tenant and charges that the tenant has refused to vacate real property after the termination of a lease. This is a common ground for an action of forcible entry and detainer.

But the Government is a stranger to both the lease and the deed. Its only relation to these instruments is that it owns the stock of RFC.

Federal Courts do not have jurisdiction of forcible entry and detainer actions except by operation of state statutes; *Weber v. Grand Lodge*, (CCA 6) 169 Fed. 522; reh. den. 171 Fed. 839; Cert. Den. 215 U.S. 616; *Iron Mountain Ry. v. Johnson*, 119 U.S. 608; *Holt v. Nixon*, (CCA 7) 141 Fed. 952; *Miles v. Caldwell*, 2 Wall. 35; *Wilcox v. McConnell*, 13 Pet. 496, 516; *Lang Co. v. Fort*, (CCA 3) 76 Fed. (2) 27, 29.

In 13 *Cyclopedia of Federal Procedure*, 2d Ed., 514, Sec. 6953, the editors say:

“There are no federal statutes governing ejectment actions in general in the federal courts, and there is no rule of the Federal Rules of Civil Procedure which specifically mentions such actions.”

The same is true of forcible entry and detainer.

In *Denee v. Ankeny*, 246 U.S. 208, 213, the Supreme Court of the United States quoted with approval the Supreme Court of Washington as follows:

“ ‘The United States statutes have made no provision for determining conflicting rights under claim of possession but the determination of these rights is left to the states to be regulated.’ ”

We quote from *Miles v. Caldwell*, 2 Wall. 35:

“Reverting now to the question of policy grounded on the supposed sanctity of land titles as affecting the conclusiveness of judgments in trespass or ejectment we remark that it is the settled doctrine of all courts in reference to all questions affecting the title to real estate to permit the different states of the union to settle them each for itself; and when the point involved is one which becomes a rule of property, we follow the statutes of the states or their views of the general policy.”

The doctrine of the cases last cited is the more true in the light of *Erie Railway v. Tompkins*, 304 U.S. 64, 78, where the court said:

“Except in matters governed by the Federal Constitution or by Acts of Congress the law to be applied in any case is the law of the state.”

## **FORCIBLE ENTRY AND DETAINER STATUTE OF OREGON**

Thus the Oregon Statute is brought under examination of this court. This statute will be found in I O.C. L.A. 8-301 to 8-328. The first ten sections of the Oregon

statute define tenancies and provide for notices terminating the same. Section 8-313 is the section which authorizes actions in forcible entry and detainer. This section reads as follows:

*“Action for forcible entry or wrongful detainer. When a forcible entry shall be made upon any premises or when an entry shall be made in a peaceable manner and the possession shall be held by force, the person entitled to the premises may maintain in the county where such property is situated an action to recover the possession thereof in the circuit court of said county, or before any justice of the peace of said county.”*

In *Schroeder v. Woody*, 166 Ore. 93, 96, 97, the Court said with respect to the action of forcible entry and detainer that it is statutory and of a special summary nature and is in derogation of the common law; that the statute must be strictly construed, and applies only as between landlord and tenant. The court sustained a demurrer to a complaint by a vendor against a vendee. We quote:

(96) “ ‘Since the action of forcible entry and detainer is a special statutory proceeding, summary in its nature, and in derogation of the common law, it is a rule of universal application in such actions that the statute conferring jurisdiction must be strictly pursued in the method of procedure prescribed by it, or the jurisdiction will fail to attach, and the proceeding be coram non judice and void. Even if the action is tried in a court of record, the latter does not proceed therein by virtue of its power as a court of general jurisdiction, but derives its authority wholly from the statute, and in such proceeding is, therefore, to be treated as a court of special and limited jurisdiction.’ ”

(97) “ ‘It seems also clear that the unlawful holding by force, as defined in section 8-311, refers only to cases where the relation of landlord and tenant exists and, as this is not such a case, there is no authority conferred by the statute for the bringing of an action in this form.’ ”

In *Twiss v. Boehmer*, 39 Ore. 359, the defendant had entered peacefully and defended on the ground that he was not a tenant of the plaintiff. The plaintiff owned the property, and the court examined the relations between the parties and concluded that the relation of landlord and tenant existed and ousted the defendant. Mr. Justice R. S. Bean said (362):

“It has been decided by this court that the summary remedy given by Chapter XLIV, Hill’s Ann. Laws, for the forcible entry and detainer of land, is not a substitute for an action of trespass or ejectment, but is confined to cases where the entry or detention is by force (*Taylor v. Scott*, 10 Or. 483; *Harrington v. Watson*, 11 Or. 143, 50 Am. Rep. 465, and note, 3 Pac. 173); or where the relation of landlord and tenant exists between the parties, and the tenant, who is holding over after the expiration of his term, or has forfeited his right to the possession, refuses to vacate, after note to quit: *Hislop v. Moldenhauer*, 21 Or. 208 (27 Pac. 1052).”

In the case of *Purcell v. Edmunds*, 175 Ore. 68, 70, the defendants purchased the rights of a purchaser of the property and the plaintiff was the owner. The action of forcible entry and detainer was attempted, but both the trial and Supreme Courts held that such an action would not lie. The court said (70):

“The judgment for the defendants must be affirmed, on the authority of *Schroeder v. Woody*,

166 Or. 93, 109 P. (2d) 597. In that case it was pointed out that an action of forcible entry and detainer is a special statutory proceeding, in derogation of the common law. It was there decided that the Oregon statute in reference to forcible entry and detainer, Secs. 8-311 to 8-324, both inclusive, O.C.L.A., is limited to cases in which the relation of landlord and tenant exists, except when the entry has been made forcibly. The summary remedy given by statute for the forcible entry and detainer of land is not a substitute for an action of trespass or ejectment: *Twiss v. Boehmer*, 39 Or. 359, 65 P. 18."

We have cited the Supreme Court and other Federal authorities to the effect that the present action is grounded upon the Oregon statute. We have quoted the statute and have cited the Oregon cases construing the same. The action of forcible entry and detainer in Oregon is statutory and is in derogation of the common law and must, in any case, be brought strictly under the statute. It is restricted to cases between the landlord and tenant.

There is no relation of landlord and tenant between the United States and Shofner Iron & Steel Works. The first cause of action alleges such a relation as between RFC and the Appellee but not as between the Government and the Appellee. The cases cited by the Government to the effect that the United States can bring suit for a money judgment or on an obligation due one of its corporations, proceed without the aid of state statutes. Federal corporations are organized under acts making various provisions concerning suits. The Reconstruction Finance Corporation Act authorizes the RFC (15 U.S.C. 604):

“To sue and be sued, to complain and to defend, in any court of competent jurisdiction, state or federal.”

The relationship of landlord and tenant exists under the first cause of action between RFC and the Appellee. Under the facts alleged in the first cause of action, the RFC could bring a suit under the Oregon statute for forcible entry and detainer in a state court for Multnomah County, Oregon, or in the District Court of the United States for the District of Oregon. The United States cannot maintain the present suit without doing violence to the Oregon statute. It is one thing for the Federal courts to look behind the corporate veil sufficiently to allow the Government to bring suit or join as plaintiff in a suit on a promissory note payable to RFC; it is entirely another thing to find the relationship of landlord and tenant within the meaning of the Oregon statute between the Government and an Oregon citizen in respect to Oregon real estate growing out of a lease to DPC or RFC. We submit that Judge Brown was right and that this court should not carry the principle of the cases cited in the Government's Brief to the extent of disregarding the Oregon statute on tenancy and forcible entry and detainer or the construction of that statute as adopted by the Supreme Court of Oregon.

Nor is there anything in the Surplus Property Act which permits or justifies the overriding of the Oregon Statute. As pointed out by the Government's Brief, the Surplus Property Act recognizes owning and disposal agencies. The RFC is the owning agent with re-

spect to the real property described in the first cause of action. The provision of the Surplus Property Act with respect to the duty of the disposal agency cannot amend or override the statute of Oregon with respect to acts of forcible entry and detainer. If the disposal agency requires possession of this real estate in order to perform its functions, the owning agency, having the only existing right to bring suit for that possession, should do so and should eventually secure possession for the disposal agency.

The construction of the Surplus Property Act which the Government seeks this court to adopt impinges upon and disregards the Oregon statute and it is contrary to the expression of the Supreme Court in *Denee v. Ankeny* supra. The construction of the Surplus Property Act which we seek this court to adopt recognizes the sovereignty of Oregon and validity of its statutes and at the same time suggests a means by which the disposal agency can, with any proper aid which the owning agency can give, perform the functions required of it by the Act.

## EJECTMENT STATUTE OF OREGON

Before the District Court when we cited the Oregon statutes and decisions on forcible entry and detainer, the United States Attorney took the position that the case at Bar was a suit in ejectment and not in forcible entry and detainer. We doubt whether the Government will take this position in its reply brief, but since this is the only brief we anticipate writing in this case, we

will discuss the Oregon ejectment statute. This will be found at 1 O.C.L.A. 8-201 et seq. Sec. 8-201 provides as follows:

“Any person who has a legal estate in real property, and a present right to the possession thereof, may recover such possession, with damages for withholding the same, by an action at law. Such action shall be commenced against the person in the actual possession of the property at the time, or if the property be not in the actual possession of anyone, then against the person acting as the owner thereof.”

Under this statute the Oregon Court has always held that plaintiff in ejectment must show a good legal title and a present right of possession in himself and that he cannot recover on the weakness of the defendant's title. *Phillipi v. Thompson*, 8 Ore. 428; *Coles v. Meskimen*, 48 Ore. 54, 56; *Comegys v. Hendricks*, 55 Ore. 533; *Bobell v. Wagenar*, 106 Or. 232, 244.

This is the requirement of the ejectment statutes of practically all states. 28 C.J.S. 856, Sec. 10.

There is no general ejectment statute to be found in the United States Code. In ejectment actions as well as in those of forcible entry and detainer, the federal courts follow the rule of property of the state in which the land is located. Again we refer the court to *Denee v. Ankeny*, 246 U.S. 208, and the cases cited with it.

*Smith v. McCann*, 24 How. 398, 403, was an ejectment suit under the Maryland statute. Chief Justice Taney said:

(403) “In Maryland . . . the action of ejectment



is the only mode of trying title to lands. And in that action the lessor of the plaintiff must show a legal title to himself to the land he claims and a right of possession under it . . . nor is the defendant required to show any title in himself."

If the first cause of action is treated as ejectment rather than forcible entry and detainer, the United States, as plaintiff, is met by an even stronger statutory bar than is offered by the Oregon statute on the latter action. To recover in ejectment, the Government cannot rely on the weakness, if any, of the Appellee's title. It must prove a "strict legal title" in itself. This the Government does not allege. On the contrary, the allegations are a legal title in RFC. If this court is asked by the Government, in a reply brief, to draw aside the corporate veil of RFC and by that process to find a "strict legal title" in the Government for the purpose of satisfying the Oregon Ejectment Statute, this would constitute a total disregard of that statute and could not possibly fall under the head of interpretation or construction.

We see no reason why this court should impinge upon or destroy the integrity of the Oregon statutory law upon which the sanctity of its real estate titles relies. Reconstruction Finance Corporation, as a plaintiff, in either an ejectment suit or one for forcible entry and detainer satisfies the requirement of the Oregon law.

We do not mean to suggest by this brief that the Government be deprived of such lawful right as it may have to dispose of the real property described in the first cause of action as surplus. We see no reason why

RFC cannot bring a suit to recover its possession and upon doing so turn its possession over to War Assets Administration. If Appellee is able to assert against RFC a defense to a suit for forcible entry and detainer or ejectment, which defense might not be available as against the Government itself, then the RFC, in attempting to turn this property over to War Assets Administration without securing possession, is attempting to turn over more than it has, and should be restrained. If there are weaknesses or flaws in the title of RFC, which the Appellee might assert as against RFC, but not as against the Government, the Appellee should not be deprived of its lawful right or opportunity to rely upon the same.

The orderly disposal of the real property described in the first cause of action does not require or justify the act which the Government seeks to accomplish in this suit or the destroying of the Oregon statutory law which would be brought about if the Government were allowed to succeed in its purpose.

We respectfully submit that Judge Brown's decision should be upheld and that the RFC should be left with the problem of securing possession of this land and turning that possession over to the War Assets Administration if there should be any need for such action.

Respectfully submitted,

MACCORMAC SNOW,

A. M. HODLER,

Attorneys for Appellee.

No. 11671

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**In the United States Circuit Court of Appeals  
for the Ninth Circuit**

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**UNITED STATES OF AMERICA, APPELLANT**

*v.*

**SHOFNER IRON AND STEEL WORKS, A CORPORATION,  
APPELLEE**

---

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF OREGON**

---

**REPLY BRIEF FOR THE UNITED STATES**

---

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**FILED**

**NOV 14 1947**

**PAUL P. O'BRIEN,**



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# **In the United States Circuit Court of Appeals for the Ninth Circuit**

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No. 11671

UNITED STATES OF AMERICA, APPELLANT

*v.*

SHOFNER IRON AND STEEL WORKS, A CORPORATION,  
APPELLEE

---

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF OREGON*

---

## **REPLY BRIEF FOR THE UNITED STATES**

---

In our opening brief we pointed out that the United States was the proper party to institute the present action for two reasons: First, because by virtue of the Surplus Property Act Congress has given to the War Assets Administration the right to possession of this property and has imposed upon that agency the duty of preserving and protecting it; and, second, because the United States, by virtue of its relationship with its wholly-owned corporation, may assert a cause of action of RFC. Appellee does not directly challenge these propositions, but it seeks to avoid their effect by reference to local law relating to actions for forcible entry and detainer and ejectment. In so doing appellee is urging a ground

not taken by the court below and for reasons to be given, we submit that appellee's argument lacks merit.

## I

**The right of the United States to bring an action to recover possession of surplus property of one of its Government corporations is not dependent upon or governed by State law**

The United States may maintain suits in its own courts for the purpose of protecting and enforcing its governmental rights and to aid in the execution of its governmental policies. *Cramer v. United States*, 261 U. S. 219, 232-233 (1923); *United States v. New Orleans Pac. Ry. Co.*, 248 U. S. 507, 518 (1919). When the United States appears as a litigant asserting a right arising out of its governmental activities, its rights are determined by federal not state law. *United States v. Standard Oil Co.*, 91 L. Ed. adv. op. 1507, 1509-1513, No. 235, October Term 1946, decided June 23, 1947; *United States v. Allegheny County*, 322 U. S. 174, 182-183 (1944); *Clearfield Trust Co. v. United States*, 318 U. S. 363, 366-367 (1943); *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U. S. 447, 455-456 (1942); *Deitrick v. Greaney*, 309 U. S. 190, 200-201 (1940); *United States v. Shaw*, 309 U. S. 495 (1940); *Board of Comm'rs v. United States*, 308 U. S. 343, 349-351 (1939). Thus, in ascertaining the obligation of the guarantor of a forged endorsement on a check drawn by the United States, the Supreme Court stated in the *Clearfield* case, *supra*, at pp. 366-367:

The rights and duties of the United States on commercial paper which it issues are governed



by federal rather than local law. When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power. \* \* \* The authority to issue the check had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of Pennsylvania or of any other state. \* \* \* The duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources. \* \* \* In the absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards.

Similarly in determining whether the United States had title to certain machinery so as to exempt it from state taxation the Court said in *United States v. Allegheny County, supra*, at pp. 182-183:

Every acquisition, holding, or disposition of property by the Federal Government depends upon a proper exercise of a constitutional grant of power. \* \* \* The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state.

*Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938), and similar cases cited by appellee (Br. 5-6) have no application in determining the rights and powers of the Federal Government in the performance of its

governmental functions. *United States v. Standard Oil Co.*, and other cases cited *supra*.

Appellee states (Br. 5): "But the Government is a stranger to both the lease and the deed. Its only relation to these instruments is that it owns the stock of RFC." Elsewhere it asserts (Br. 9) that there is no relation of landlord and tenant between the United States and Shofner but only between RFC and Shofner. Again (Br. 13) it emphasizes that legal title is in RFC and not the United States. Thus, appellee's entire argument is based upon the assertion that RFC and the United States are entirely separate and distinct entities and must be so treated by the courts. But whether RFC and the United States are to be considered independently is a matter upon which federal law is controlling.

Congress in the exercise of its power to provide for national defense authorized the acquisition of property by its government-owned corporations (Govt. Br. 6).<sup>1</sup> Acting under its power to dispose of that property once it was no longer needed for the governmental purposes for which it was acquired, Congress, by enacting the Surplus Property Act, set up a procedure and declared a policy for the disposal of surplus government property, a procedure and a policy which apply to property of RFC as well as to property

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<sup>1</sup> Every action of the United States within its constitutional powers is governmental action whether it acts itself through one of its departments or through a corporation which it owns or controls. *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 477 (1939); *Pittman v. Home Owners' Loan Corporation*, 308 U. S. 21, 32 (1939).

administered by the regular departments of the Government. And, as we have shown (Govt. Br. 7-11) Congress has given the War Assets Administration the right to possess the federal property here involved and has imposed upon it the duty of caring for and disposing of that property.

Moreover, the fact that bare legal title is in RFC does not make the property any less the property of the United States. As this Court recently pointed out in holding that Defense Supplies Corporation<sup>2</sup> was entitled to ship benzol at land grant rates applicable to "military or naval property of the United States," "there was such identity of interest and function between Supplies and the United States that ownership of the benzol by Supplies was equivalent to ownership by the United States." *Southern Pac. Co. v. Reconstruction Finance Corporation*, 161 F. 2d 56, 57-60 (1947). See also *King County, Wash. v. United States Ship. Board E. F. Corp.*, 282 Fed. 950, 953 (C. C. A. 9, 1922). Like the gold involved in *United States Grain Corp. v. Phillips*, 261 U. S. 106, 113 (1923) the property here involved is in substance the property of the United States although legal title is in the corporation. Just as it may sue to recover rents due under a lease executed by a government corporation as it did in *United States v. Skinner & Eddy Corp.*, 35 F. 2d 889, 894 (C. C. A. 9, 1929), so the United States may sue to recover possession of the leased

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<sup>2</sup> RFC created Defense Supplies Corporation under the same statutory authority under which it created Defense Plant Corporation.

premises wrongfully withheld by the lessee. State law cannot defeat the right of the United States to protect its governmental interests. Cf. *United States v. Summerlin*, 310 U. S. 414 (1940).<sup>3</sup>

## II

**Oregon law does not preclude a suit by the United States to recover possession of the surplus property of one of its Government corporations**

In the foregoing discussion we have assumed that appellee is correct in its contention that the United States is not a proper party to bring the action under Oregon law. It is submitted, however, that it does not follow from the state statutes and decisions relied upon (Br. 6, 13) that the United States may not bring this action.

It is immaterial to the question presented on this appeal whether the action is one in forcible entry and detainer or one in ejectment.<sup>4</sup> The facts alleged in the Government's complaint contain the essential elements of either cause of action. Appellee's objec-

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<sup>3</sup> Whether the interest of the United States in the property of its corporations, or more particularly their surplus property, falls within any established category of property interests sufficient to maintain a suit for its possession under state law, its rights will be recognized and enforced in the federal courts. Cf. *United States v. San Geronimo Development Co.*, 154 F. 2d 78, 85 (C. C. A. 1, 1946) certiorari denied 329 U. S. 718 (1946); *Missouri, etc., Ry. Co. v. Kansas Pac. Ry. Co.*, 97 U. S. 491, 497 (1878); *United States v. Allegheny County*, 322 U. S. 174, 182-183 (1944).

<sup>4</sup> Under rule 2 of the Federal Rules of Civil Procedure, there is only one form of action. Under rule 54 (c) every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

tions to the maintenance of both actions will, therefore, be treated together. The sole question is whether the United States is the proper party to bring the action.

It is first said (Br. 6-9) that the United States cannot bring an action of forcible entry and detainer because the Oregon law limits this action to cases where the relation of landlord and tenant exists. That relationship does exist in the case at hand. It is true that the lease was not executed in the name of the United States, but rather in the name of one of its corporations for the purpose of carrying on a lawful governmental activity. Questions arising out of a relationship similar to that between the United States and its government corporations are not likely to be found in State cases. However, we know of no Oregon case which would indicate that the Oregon courts would hold, contrary to the many federal court decisions cited above and despite the provisions of the Surplus Property Act, that RFC and the United States are so separate and distinct that the United States could not bring an action of forcible entry and detainer under the circumstances presented here. The cases cited by appellee (Br. 7-9) do not so indicate. In neither *Schroeder v. Woody*, 166 Ore. 93, 109 P. 2d 597 (1941) nor *Purcell v. Edmunds*, 175 Ore. 68, 151 P. 2d 629 (1944) was there any landlord and tenant relationship. Both cases involved the rights of a vendor as against a vendee.

But regardless of whether an action of forcible entry and detainer is appropriate under the circum-

stances, the facts alleged in the complaint clearly support an action in ejectment.<sup>5</sup>

Appellee contends that the United States cannot maintain ejectment because the Government cannot rely on the weakness, if any, of appellee's title, but must prove "strict legal title" in itself (Br. 13). Here again, there is nothing in the cases cited (Br. 12) which indicates that the Oregon courts would hold that despite the relationship between the United States and RFC and despite the provision of the Surplus Property Act, the United States could not bring an action of ejectment to recover possession of the property. Moreover, contrary to appellee's contention, there are numerous cases in Oregon in which a party has been held entitled to maintain an action in ejectment although his interest in the property was something less than "strict legal title." E. g., *Weath-erford v. McKay*, 59 Ore. 558, 117 Pac. 969 (1911); *Kingsley v. United Rys. Co.*, 66 Ore. 50, 133 Pac. 785 (1913); *Feehely v. Rogers*, 159 Ore. 361, 372-376, 80 P. 2d 717 (1938); see also *Malony v. Adsit*, 175 U. S. 281, 288-290 (1899); *Patterson v. Hamilton*, 274 Fed. 363 (C. C. A. 9, 1921); *Carroll v. Price*, 81 Fed. 137 (D. Alaska 1896); *Ewert v. Robinson*, 289 Fed. 740, 750-754 (C. C. A. 8, 1923); 1 Tiffany, Landlord and Tenant (1910), sec. 37, p. 293. As the Oregon

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<sup>5</sup> The statutory proceeding of forcible entry and detainer is not exclusive and does not supersede any other remedies which the party may have, such as ejectment. 1 Ore. Comp. Laws, Ann. sec. 8-328; see also *Pioneer Coal Co. v. Bush*, 16 F. Supp. 117, 119 (E. D. Ky. 1936); 4 Thompson, Real Property (Perm. Ed.) sec. 1670, p. 170, sec. 1671, p. 172.

Supreme Court pointed out in *Feehely v. Rogers*, *supra*, at page 376, the right to possession of the land is the material issue in an ejectment action and the action should be prosecuted in the name of the real party in interest, i. e., the one who has the right. Inasmuch as the United States (acting through the War Assets Administration) has the right to possession and control of surplus property of RFC, it is the real party in interest in an action to recover its possession.

#### CONCLUSION

It is submitted that the right of the United States to bring an action in the federal courts to recover possession of surplus property of RFC is to be determined according to federal, not state law. It is further submitted, however, that the statutes and decisions of the state of Oregon do not preclude the bringing of such an action by the United States. The judgment below should, therefore, be reversed.

Respectfully,

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HENRY L. HESS,  
*United States Attorney,  
Portland, Oregon.*

ROGER P. MARQUIS,  
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Washington, D. C.*

NOVEMBER 1947.





IN THE  
**United States**  
**Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

---

HARRY C. KELLY,

*Appellant,*

vs.

P. J. SQUIER, Warden, United States  
Penitentiary, McNeil Island, Washington,  
*Appellee.*

---

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE WESTERN DISTRICT OF WASHINGTON  
SOUTHERN DIVISION

---

HONORABLE CHARLES H. LEAVY, *Judge*

---

**BRIEF OF APPELLEE**

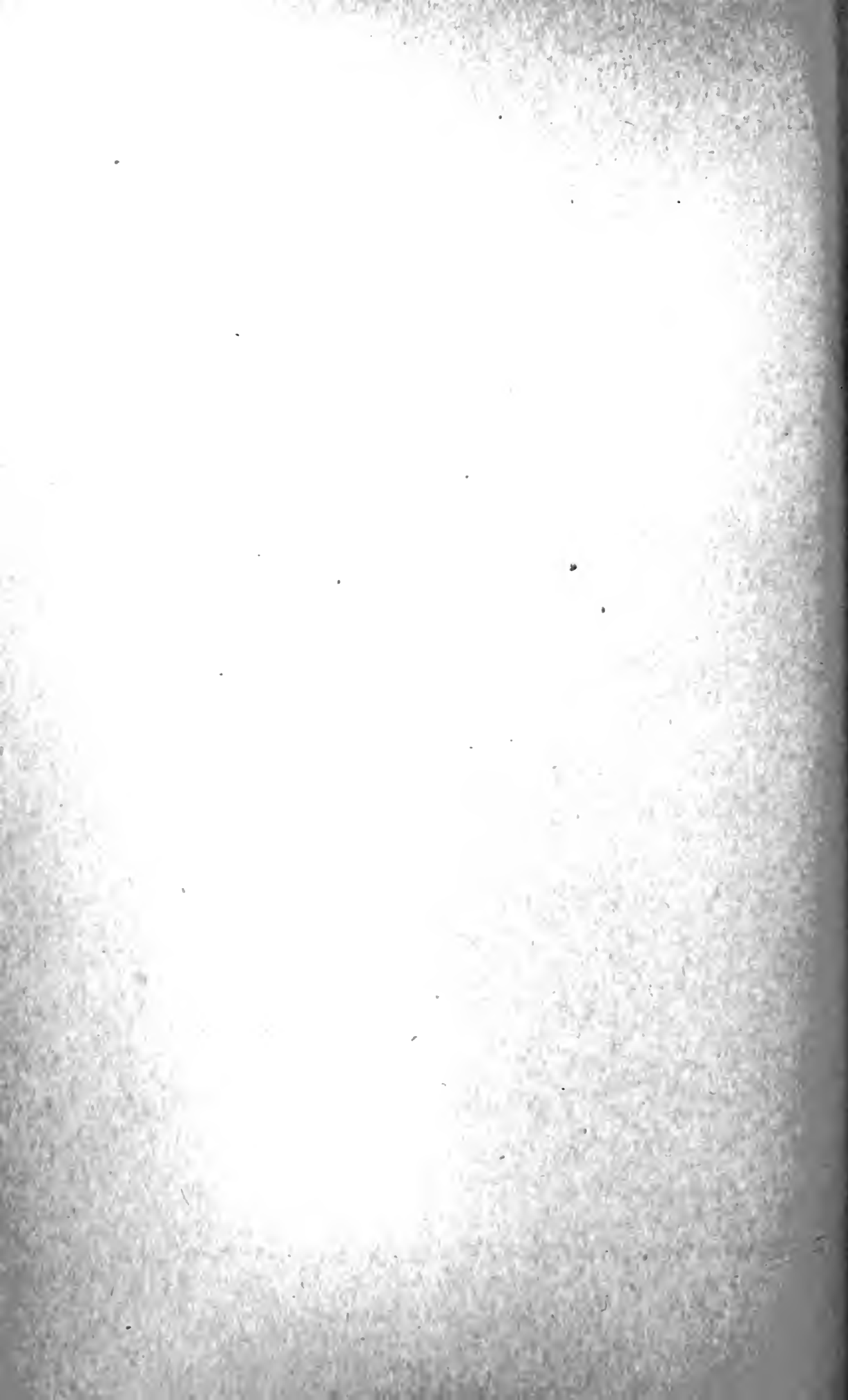
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GUY A. B. DOVELL,  
*Assistant United States Attorney*  
*Attorneys for Appellee.*

OFFICE AND POSTOFFICE ADDRESS-  
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TACOMA 2, WASHINGTON

---



IN THE  
**United States**  
**Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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HARRY C. KELLY,

*Appellant,*

vs.

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**BRIEF OF APPELLEE**

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J. CHARLES DENNIS,  
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GUY A. B. DOVELL,  
*Assistant United States Attorney*  
*Attorneys for Appellee.*



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IN THE  
**United States**  
**Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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HARRY C. KELLY,

*Appellant,*

vs.

P. J. SQUIER, Warden, United States  
Penitentiary, McNeil Island, Washington,  
*Appellee.*

---

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE WESTERN DISTRICT OF WASHINGTON  
SOUTHERN DIVISION

---

HONORABLE CHARLES H. LEAVY, *Judge*

---

**BRIEF OF APPELLEE**

---

**QUESTION INVOLVED**

Did the systematic exclusion of women from the grand jury panel and the grand jury drawn therefrom that returned the indictment against the appellant herein upon the charge of which he was convicted and later sentenced and committed render such indictment void thereby involving a denial of due

process, and the conviction subject to attack on such ground in a habeas corpus proceeding?

## STATEMENT

On September 21, 1932, an indictment containing two counts was returned against Harry C. Kelly, the appellant herein, in the Southern Division of the United States District Court for the Northern District of California, which charged him in Count One with robbing a person having lawful charge, control and custody of mail matter and, in effecting the robbery, putting such person's life in jeopardy by the use of a dangerous weapon, contrary to 18 U.S.C. 320 (R. 6-7). Thereafter on September 23, 1932, appellant was arraigned, pleaded guilty to Count One of the indictment and was sentenced to a term of imprisonment for the period of twenty-five years. (R. 8).

Appellant was just received at the McNeil Island Penitentiary on October 9, 1932 (R. 10). On March 21, 1933 he was transferred to the United States Penitentiary at Leavenworth, Kansas, and on September 4, 1934, was transferred to the United States Penitentiary at Alcatraz, California. (See *Kelly v. Johnston*, 111 F. (2d) 613), and on January 8, 1946 was returned to McNeil Island from Alcatraz.

While at Alcatraz, the appellant made at least



five applications for Writ of Habeas Corpus, some of which culminated in appeals.

In *Kelly v. Johnston*, 111 F. (2d) 613, appellant denied he was informed of his right to counsel, but the appellate court found otherwise and affirmed the district court's decision.

In *Kelly v. Johnston*, 128 F. (2d) 793, appellant repeated his former grounds and in addition sought to show the stamps taken in the robbery were not mail matter within the contemplation of the statute. The appellate court affirmed the District Court, and due to appellant's record of convictions did not feel disposed to recommend that his sentence be commuted by the President to the time then served.

In addition to the foregoing proceedings, appellant's motion for appointment of counsel to represent him on appeal in forma pauperis from denial of motion to vacate and set aside his judgment and sentence was denied by the court.

*Kelly v. United States*, 135 F. (2d) 919.

The appellant represented himself in his aforementioned appeal, after the court's denial to appoint counsel and the appellate court affirmed the order of the district court denying his motion to vacate and

set aside the judgment and sentence. (R. 12).

*Kelly v. United States*, 138 F. (2d) 489.

These denials in the District Court of California and in the Circuit Court of Appeals did not satisfy appellant's craving for judicial determination, and from each appellate court decision, except the motion for counsel he sought and was denied a writ of certiorari by the Supreme Court, as well as a rehearing thereon, respectively.

*Kelly v. Johnston*, 312 U.S. 691, 715;

*Kelly v. Johnston*, 317 U.S. 699, and 318 U.S. 798;

*Kelly v. United States*, 324 U.S. 855, 888.

The appellant filed his present application for Writ of Habeas Corpus on April 4, 1947 (R. 5) with the District Court, and appellee was thereupon ordered to show cause on April 29, 1947, of the detention of appellant (R. 16-17).

To the order to show cause, appellee filed his response on April 23, 1947 (R. 21) and produced in court the body of the appellant at time of return and hearing on April 29, 1947 (R. 22, and transcript hearing).

The appellant at time of said hearing made oral traverse to appellee's return and confined the issue to the question hereinbefore stated, (R. 23, where-

upon the District Court, after full hearing, (Transcript Hearing, pages 1-20, R. 37-56) entered its order denying the application and dismissing the action. (R. 23-24). From that final order appellant has brought this appeal in forma pauperis, (R. 27-36), leave to so appeal having been indicated by the District Court at the time of said hearing. (Tr. Hearing 19) and prior to this court's decision in *Redmon v. Squier, Warden*, on May 16, 1947.

## ARGUMENT

Appellant's extensive reasoning set forth in his brief is based entirely upon the premise that dismissal of an indictment in a criminal cause upon grounds of exclusion of women from the grand jury panel, and so from the grand jury returning the indictment is a determination that such indictment is beyond all question void.

The fact that appellant plead guilty to the count of the indictment upon which he was sentenced and committed seems in no way to soothe his belated feeling of having been slighted in proceedings that admittedly lacked feminine adornment and above all in a state so endowed.

As early as October 15, 1883, the Supreme Court had in connection with proceedings on the qualifica-

tion and disqualification of certain persons for grand jury service, expressed its opinion as follows:

“The defendants should either have moved to quash the indictment or have pleaded in abatement, if they had no opportunity, or did not see fit, to challenge the array. This, we think, is the true doctrine in cases where the objection does not go to the subversion of all the proceedings taken in impanelling and swearing the grand jury; but relates only to the qualification or disqualification of certain persons sworn upon the jury, or excluded therefrom; or to mere irregularities in constituting the panel. We have no inexorable statute making the whole proceedings void for any such irregularities.”

*United States v. Gale*, 109 U.S. 65, 67.

And further on page 70, the court said:

“These remarks apply with additional force where the objection is not to the disqualification of jurors who are actually sworn upon the panel, but to the exclusion or excuse of persons from serving on the panel. A disqualified juror placed upon the panel may be supposed injuriously to affect the whole panel; but if the individuals forming it are unobjectionable and have all the necessary qualifications, it is of less moment to the accused what persons may have been set aside or excused. The present case is of the latter kind. No complaint is made that any of the grand jurors who found the indictment were disqualified to serve, or were in any respect improper persons. It is only complained that the court excluded some persons for an improper cause, that is, because they labored under the disqualification created by the 820th Section of the Revised Statutes, which is alleged to be unconstitutional. It is not complained that the jury ac-

tually impaneled was not a good one; but that other persons equally good had a right to be placed on it. These persons do not complain. If their right to serve on the grand jury was improperly infringed, perhaps they might complain of being excluded. That is another matter. Or, perhaps, the defendants, if correct in their assumption that the law is unconstitutional, and that the court was governed by an improper rule in excluding persons under it, might have had the benefit of the error by moving to quash the indictment, or by pleading in abatement. But passing by these proper modes of taking the objection, they waited until they had been tried and convicted on a plea of not guilty, and then moved in arrest of judgment. We think they were too late in raising the objection."

Thereafter the matter of a qualified grand jury was tested in habeas corpus proceeding of *Ex parte Wilson*, 140 U.S. 575, and the Supreme Court in a decision dated May 25, 1891, in the language of head-note 3, held:

"A deficiency in the number of grand jurors prescribed by law, there being present a number sufficient to find an indictment, is a defect not going to the matter of jurisdiction, and one which cannot be taken advantage of after conviction, by Writ of Habeas Corpus."

Again in *Kaizo v. Henry*, 211 U.S. 146, decided November 16, 1908, proceedings upon habeas corpus petition alleging questionable citizenship of the grand jury, the court at page 149, said:

"The indictment though voidable, if the objec-

tion is seasonably taken, as it was in this case, is not void.”

To the same effect is *Harlan v. McGourin*, 218 U.S. 442, decided November 28, 1910, upon habeas corpus proceedings, raising objections to the organization of the grand jury.

See also *United States ex rel McCann v. Thompson*, 56 F. Supp. 661, aff'd 144 F. (2d), 604, cert. denied, 323 U.S. 790; and Title 18 U. S. C. A. Section 556a.

The more recent decision in *Ballard v. United States*, 329 U.S. 187, a criminal cause, dismissing indictment found by grand jury drawn from a panel from which women were excluded, is not applicable to the instant case. Rather, the words of the dissenting opinion of Justice Frankfurter on page 199 are pertinent where he said:

“Even now, this court does not find that the exclusion of women constitutes an inroad on the vital safeguards for a criminal trial so as to involve a denial of due process.”

Similar construction has been placed upon the effect of the Ballard case by the Circuit Court of Appeals for the Ninth Circuit in *Redmon v. Squier, Warden*, decided May 16, 1947, wherein the court held:

“As far as the Ballard case, *supra*, is concerned, it is not authority for the proposition that a grand jury panel can be attacked by habeas corpus proceedings. The objection should be made

seasonably, by motion to quash, or some similar motion."

## CONCLUSION

For the foregoing reasons, it must be contended the decision below should be affirmed.

Respectfully submitted,

J. CHARLES DENNIS,  
*United States Attorney*

GUY A. B. DOVELL,  
*Assistant United States Attorney*  
*Attorneys for Appellee.*





No. 11680

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit

---

WEBSTER-BRINKLEY COMPANY,  
a corporation,

Appellant,

vs.

THOMAS R. BELFIELD,

Appellee.

---

Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Western District of Washington,  
Northern Division

FILED  
SEP 19 1947

PAUL P. O'BRIEN,



United States  
Circuit Court of Appeals  
For the Ninth Circuit

---

WEBSTER-BRINKLEY COMPANY,

a corporation,

Appellant,

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Western District of Washington,  
Northern Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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LEO W. STEWART,

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Seattle 1, Washington.

In the District Court of the United States for the  
Western District of Washington, Northern  
Division

No. 1530

THOMAS R. BELFIELD and  
JOHN G. FOSTER,

Plaintiffs,

vs.

WEBSTER-BRINKLEY CO., a corporation,  
Defendant.

### COMPLAINT

The plaintiff, Thomas R. Belfield, for first cause of action, complains of the defendant and alleges:

#### I.

That he is a resident of King County, Washington.

#### II.

That the defendant Webster-Brinkley Co. is a corporation organized and existing under the laws of the State of Washington with its principal place of business at Seattle, King County, Washington.

#### III.

During all the time herein mentioned this plaintiff was employed by the defendant as assistant chief inspector under the chief inspector; that the said defendant corporation was engaged in making parts for the Maritime and Navy Service of the United States of America and for vessels con-

structed in connection with the service of the United States of America. That the United States statute provides that in this particular type of work that all time which the plaintiff worked over 40 hours a week shall be paid for at the rate of time and one-half for overtime.

#### IV.

That on or about November 20, 1944 and continuing until and including May 13, 1945, this plaintiff was so employed by the defendant and during said period he worked 591 hours overtime for the defendant; that he has not been paid for the same, or [1\*] any part thereof; that a copy of employment record therefor is hereto attached, marked Exhibit "A", and made a part of this complaint, which shows the amount of overtime put in on the respective dates named: that plaintiff's pay per hour at rate of time and one-half would be \$3.68 per hour; that the defendant is indebted to plaintiff in the sum of \$2174.88 by reason of the matters herein stated. That he has made demand for the same and has been refused payment.

#### V.

That the obligation of the defendant arises under the statutes of the United States of America.

#### VI.

That under the Federal Statute plaintiff is entitled to double the amount of wages earned and unpaid, or a total of \$4349.76.

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\* Page numbering appearing at foot of page of original certified Transcript of Record.

## VII.

That \$1500.00 is a reasonable sum to be allowed this plaintiff as attorney's fees herein.

\* \* \* (Second Cause of Action omitted on request.)—Clerk.

WHEREFORE, the plaintiff Thomas R. Belfield prays that he have judgment against the defendant in the sum of \$4349.76, together with attorney's fees in the sum of \$1500.00, or such other sum as the court may allow, and for his costs and disbursements herein.

\* \* \* (Prayer on second cause of action omitted on request.)—Clerk.

GEORGE F. HANNAN

Attorney for Plaintiffs,  
1021 Northern Life Tower,  
Seattle, Washington.

State of Washington

County of King—ss.

Thomas R. Belfield, being first duly sworn on oath deposes and says: That he is a plaintiff above named; that he has read the foregoing complaint, knows the contents thereof and that the same is true as he verily believes.

/s/ THOMAS R. BELFIELD.

Subscribed and sworn before me this 17th day of April, 1946.

[Seal] GEORGE F. HANNAN,

Notary Public in and for the State of Washington, residing at Seattle.

(Note—Affidavit of John Foster and Exhibit "B" omitted on request.)—Clerk.

[Endorsed]: Filed April 19, 1946.

## EXHIBIT "A"

Overtime covering period November 20, 1944 to  
May 13, 1945:

Date	Number Hours Over- time Worked		Date	Number Hours Over- time Worked		Date	Number Hours Over- time Worked	
1944			1944			1945		
Nov. 20	2.5		Dec. 29	2.5		Feb. 6	2.0	
" 21	2.0		" 30	8.0		" 7	6.0	
" 22	3.0		1945			" 8	2.0	
" 23	3.5		Jan. 2	2.0		" 9	1.0	
" 25	8.0		" 3	1.5		" 10	8.0	
" 26	7.0		" 4	2.0		" 12	2.0	
" 27	4.0		" 5	2.0		" 13	2.0	
" 28	2.0		" 6	8.0		" 14	2.0	
" 29	2.0		" 7	9.0		" 15	4.0	
" 30	1.0		" 8	3.0		" 16	8.0	
Dec. 1	4.5		" 9	3.0		" 17	7.0	
" 2	8.0		" 10	2.0		" 18	3.0	
" 4	3.0		" 11	3.0		" 19	3.0	
" 5	4.5		" 12	5.0		" 20	5.0	
" 6	4.5		" 13	8.0		" 21	2.0	
" 7	3.0		" 15	3.0		" 22	1.0	
" 8	2.5		" 16	2.0		" 23	8.0	
" 9	8.0		" 17	2.0		" 24	3.0	
" 10	6.0		" 18	5.0		" 26	2.0	
" 11	3.0		" 19	4.0		" 27	2.0	
" 12	7.0		" 20	8.0		" 28	2.0	
" 13	4.0		" 22	3.0		Mar. 1	2.0	
" 14	3.5		" 23	3.0		" 2	3.0	
" 15	6.5		" 24	2.0		" 3	8.0	
" 16	8.0		" 25	1.0		" 4	6.0	
" 17	6.0		" 26	5.0		" 5	2.0	
" 18	1.0		" 27	8.0		" 6	2.5	
" 19	4.0		" 28	7.0		" 7	3.0	
" 20	4.0		" 29	4.0		" 8	2.0	
" 21	3.0		" 30	2.0		" 9	1.0	
" 22	5.0		" 31	1.0		" 10	8.0	
" 23	8.0		Feb. 1	3.0		" 12	2.0	
" 26	2.5		" 2	1.0		" 13	1.5	
" 27	2.0		" 3	8.0		" 14	1.0	
" 28	2.0		" 5	2.0		" 15	3.0	

## EXHIBIT "A" (Continued)

Date	Number Hours Over- time Worked	Date	Number Hours Over- time Worked	Date	Number Hours Over- time Worked
1945		1945		1945	
Mar. 16	2.0	Apr. 5	6.0	Apr. 25	7.0
" 17	8.0	" 6	2.0	" 26	3.0
" 18	6.0	" 7	8.0	" 27	1.0
" 19	1.0	" 8	8.0	" 28	8.0
" 20	3.0	" 9	2.0	" 29	6.0
" 21	5.0	" 10	3.0	" 30	2.0
" 22	1.0	" 11	3.0	May 1	2.0
" 23	2.0	" 12	2.0	" 2	1.0
" 24	8.0	" 13	3.0	" 3	1.5
" 26	3.0	" 14	8.0	" 4	2.0
" 27	5.0	" 16	1.0	" 5	8.0
" 28	3.0	" 17	1.0	" 7	1.0
" 29	2.0	" 18	3.0	" 8	2.0
" 30	1.0	" 19	2.0	" 9	2.0
" 31	8.0	" 20	2.0	" 10	1.0
Apr. 2	3.0	" 21	8.0	" 11	3.0
" 3	2.0	" 22	6.0	" 12	1.0
" 4	3.0	" 23	3.0		
		" 24	2.0		
				Total	591 hours

[Title of District Court and Cause.]

### APPOINTMENT AND NOTICE AND CON- SENT TO SUBSTITUTION OF ATTORNEYS

To the Honorable John C. Bowen, Judge of above entitled Court, and to the above named defendant and to Catlett, Hartman, Jarvis & Williams, Attorneys for Defendant.

You and each of you will please take notice that the undersigned plaintiffs have retained and appointed Charles H. Heighton and Leo W. Stewart to represent them in the above entitled action, and consent to the substitution of such attorneys for

George F. Hannan, attorney of record for plaintiffs herein, who has passed away.

Dated this 29th day of May, 1946.

THOMAS R. BELFIELD,  
JOHN G. FOSTER,  
Plaintiffs.

[Endorsed]. Filed July 2, 1946.

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[Title of District Court and Cause.]

NOTICE OF SUBSTITUTION  
OF ATTORNEYS

To the Defendants above named, and to Catlett, Hartman, Jarvis & Williams, your attorneys:

You, and each of you, will please taken notice that the undersigned attorneys, Charles H. Heighton and Leo W. Stewart, enter this appearance for and on behalf of the plaintiffs Thomas R. Belfield and John G. Foster, and that hereafter all motions and pleadings be served upon them at their office, 1021 Northern Life Tower, Seattle, Washington.

Dated this 27th day of June, 1946.

CHARLES H. HEIGHTON,  
LEO W. STEWART,  
Attorneys for Plaintiffs.

Copy received: Catlett, Hartman, Jarvis & Williams, July 1, 1946.

[Endorsed]: Filed July 2, 1946. [6]

[Title of District Court and Cause.]

## ANSWER

Now comes the defendant in the above entitled action and in answer to the complaint of the plaintiff Thomas R. Belfield alleges as follows:

### I.

Admits the allegations of Paragraphs I and II.

### II.

As to the allegation of Paragraph III, it admits that on November 16, 1944, plaintiff Thomas R. Belfield was in the employ of the defendant as Assistant Chief Inspector; that it was engaged during certain periods of time in manufacturing steering devices and parts for the Maritime Commission and United States Navy as prime contractor and subcontractor; it denies each and every other allegation in said paragraph.

### III.

As to the allegations of Paragraph IV, it admits that the plaintiff Thomas R. Belfield was employed by it as Assistant Chief Inspector on November 16, 1944 and continued in its employ until the 15th day of May, 1945, at a salary of \$425.00 per month; it denies each and every other allegation in said paragraph.



## IV.

As to the allegations of Paragraphs V, VI, and VII, defendant denies each and every one.

For a separate and affirmative defense to the complaint of Thomas R. Belfield, it alleges as follows:

## I.

That in August of 1944, the Webster-Brinkley Company commenced the reorganization and enlargement of its Inspection Department, and on October 9, 1944, it filed an application to establish the proper salary for the position of Chief Inspector and Assistant Chief Inspector with the Salary Stabilization Unit of the Bureau of Internal Revenue which, under presidential order governing the administration of wage stabilization regulations, had jurisdiction over salaried employees occupying [7a] executive, administrative or professional positions and receiving salaries of more than \$200.00 a month; that after investigation and in November, 1944, the Salary Stabilization Unit approved the application to fix the salary of the plaintiff Thomas R. Belfield in the position of Assistant Chief Inspector at \$425.00 a month, and on November 16, the plaintiff Thomas R. Belfield entered upon his employment as Assistant Chief Inspector at the salary fixed; that the position of Assistant Chief Inspector was a supervisory position and classifiable as an executive

or administrative position under the regulations of the Administrator of the Wage and Hour Division of the Department of Labor issued pursuant to Sec. 13(a) of the Fair Labor Standards Act, being the act of June 25, 1938, 29 U. S. Code, Secs. 201-219, and that plaintiff Thomas R. Belfield was therefore exempt from the provisions of Secs. 6 and 7 of said Act; that his employment was on a monthly basis and without overtime.

For a second separate answer and affirmative defense to the complaint of Thomas R. Belfield, defendant alleges:

### I.

It repeats the allegations of Paragraph I of the first affirmative defense; it alleges further that the plaintiff Thomas R. Belfield fully understood that in the position of Assistant Chief Inspector, he was acting in an executive or administrative capacity and would not be entitled to overtime; that he was fully informed of the application to the Stabilization Unit and its action thereon, and that he accepted the employment with the understanding that he would not be paid for overtime, and continued in such employment from the 16th day of November, 1944, to May, 1945; that he received checks semi-monthly in payment for his services at the rate set forth during the whole period [8] of his employment in such position; that during that period, he never suggested or claimed that he was entitled to any overtime; he

never asserted or claimed that his position was a non-exempt position; that because of the bona fide belief of the defendant company that the position of Assistant Chief Inspector was an exempt position, and by reason of the fact that plaintiff never at any time made any claim to overtime or any objection to the checks received, defendant kept no record of the hours worked by Mr. Belfield, as it did not of its other executive and administrative employees; that by reason of the foregoing facts, the defendant Thomas R. Belfield is now estopped to claim that he occupied a non-exempt position or to claim any overtime in connection therewith. [9]

Wherefore the defendant prays that the above complaint be dismissed and that it have judgment against the plaintiffs for its costs and disbursements herein.

CATLETT, HARTMAN,  
JARVIS & WILLIAMS,

Attorneys for Defendant.

State of Washington,  
County of King—ss.

Harold H. Hartman, being first duly sworn, on oath disposes and says:

That he is Vice President of the Webster-Brinkley Company, a corporation; that he makes this verification on its behalf; that he has read the fore-

going answer, knows the contents thereof, and believes the same to be true.

/s/ HAROLD H. HARTMAN,

Subscribed and sworn before me this 17th day of July, 1946.

[Seal] /s/ MIMA P. BENSON,

Notary Public in and for the State of Washington, residing in Seattle.

July 18, 1946, Leo W. Stewart, Attorney for Plaintiff.

[Endorsed]: Filed July 22, 1946.

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[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly to be tried before the Court, sitting without a jury, on December 18, 1946, at 11:00 o'clock a. m., the plaintiffs being present in person and being represented by their attorneys, Leo W. Stewart and Charles H. Heighton, and the defendant being represented by its attorney, Fred W. Catlett, of the firm of Catlett, Hartman, Jarvis & Williams; witnesses having been sworn and testi-

fied, documentary evidence having been adduced on behalf of the plaintiffs and defendant, and the trial having been held on the merits, the Court makes the following

### Finding of Fact

#### I.

That the plaintiffs Thomas R. Belfield and John G. Foster brought the above entitled action to recover from the defendant overtime compensation and additional equal amount as liquidated damages pursuant to Sec. 16(b) of the United States Fair Labor Standards Act of 1938, hereinafter referred to as the Act; that jurisdiction is conferred upon the court by Section 14 (8) 28 United States Code.

That the defendant Webster-Brinkley Company is a corporation organized and existing under the laws of the State of Washington, with its principal place of business at Seattle, King County, Washington.

#### II.

During all the times mentioned in the complaint on file [12] herein defendant was engaged in making of various parts for the Maritime and Naval Service of the United States of America, and for vessels constructed in connection with the service of the United States Maritime service; during all the times mentioned the said defendant was engaged in interstate commerce.

## III.

That during said period from November 20, 1944 to May 13, 1945, plaintiff Thomas R. Belfield worked for the defendant as assistant chief inspector a total of 591 overtime hours for which said plaintiff has not been compensated, and that under the Act the said Thomas R. Belfield was entitled to one and one-half times his compensation for said overtime, and the rate of pay for the said Thomas R. Belfield for overtime purposes is the sum of \$3.678 per hour for said 591 overtime hours worked by said Thomas R. Belfield or the sum of \$2173.70, together with an additional equal amount as liquidated damages.

The Court further finds that the said Thomas R. Belfield was during his employment as aforesaid engaged in interstate commerce and in the production of goods for interstate commerce.

Done in open court this 4th day of January, 1947.

/s/ JOHN C. BOWEN,  
Judge.

From the foregoing Findings of Fact, the Court finds the following:

## Conclusions of Law

## I.

That this court has jurisdiction over the causes of action set forth in plaintiff's complaint and the parties to the action.

II.

That upon the first cause of action in favor of the plaintiff Thomas R. Belfield, he is entitled to judgment in his favor and [13] against the defendant in the sum of \$4347.40, together with attorneys' fees in the sum of \$500, and costs of suit.

Done in open court, this 4th day of January, 1947.

/s/ JOHN C. BOWEN,

Judge.

Presented by: Charles H. Heighton and Leo W. Stewart, Attorneys for Plaintiffs.

[Endorsed]. Filed January 4, 1947.

In the District Court of the United States for  
the Western District of Washington, Northern  
Division

No. 1530

THOMAS F. BELFIELD and  
JOHN G. FOSTER,

Plaintiffs,

vs.

WEBSTER-BRINKLEY COMPANY,  
a corporation,

Defendant.

### JUDGMENT

This cause came on regularly to be tried before the undersigned Judge of the above entitled Court, sitting without a jury, on December 18, 1946, to and including December 21, 1946, the plaintiffs being present in person and represented by their attorneys, Leo W. Stewart and Charles H. Heigh-ton; the defendant being represented by its attorney, Fred W. Catlett, of the firm of Catlett, Hartman, Jarvis & Williams, and opening state-ment on behalf of plaintiffs and the defendant having been made by respective counsel, and evi-dence on behalf of both of the parties, plaintiff and defendant, having been introduced, and closing arguments of respective counsel having been heard;

And the Court having entered herein its Find-ings of Fact and Conclusions of Law, in conformity



with which the following judgments are hereby rendered:

It Is Hereby Ordered, Adjudged and Decreed, that the plaintiff Thomas R. Belfield do have and recover judgment against the defendant Webster Brinkley Company, a corporation, on the first cause of action set forth in plaintiffs' complaint in the sum of \$4347.40, together with attorneys' fees in the sum of \$500.00 and the costs of suit herein to be taxed.

It Is Further Ordered, Adjudged and Decreed, that the second cause of action in favor of plaintiff John G. Foster, be and the same is hereby dismissed with prejudice, [15] and that the defendant have judgment against the said plaintiff for its costs and disbursements herein to be taxed.

Done in open Court this 4th day of January, 1947.

JOHN C. BOWEN,  
Judge.

Presented by

LEO W. STEWART,  
CHARLES H. HEIGHTON,  
Of Attorneys for Plaintiffs.

Approved: as to judgment against John G. Foster.

FRED W. CATLETT,  
Attorneys for Defendant.

[Endorsed]: Filed January 4, 1947. [16]

[Title of District Court and Cause.]

### MOTION FOR NEW TRIAL

Now Comes the defendant in the above entitled cause and moves the court to set aside the findings of fact and conclusions of law and judgment so far as they affect the plaintiff, Thomas R. Belfield, entered herein on the 4th day of January, 1947, and to grant defendant a new trial so far as the plaintiff, Thomas R. Belfield is concerned, for the following grounds materially affecting substantial rights of the defendant:

1. Insufficiency of the evidence to justify the decision of the court.
2. Error in law occurring at the trial.

#### I.

The evidence was insufficient to justify the court in concluding that Thomas R. Belfield was not employed in an executive and administrative capacity and was not exempt from the Federal Fair Labor Standards Act but was subject to said Act and entitled to overtime under it.

#### II.

The evidence was also insufficient to justify the court in finding that Thomas R. Belfield was employed at \$425.00 a month upon the basis of 40 hours of work per week, and is insufficient to justify any finding by the court that the basis of employment was other than \$425.00 a month for

such number of hours per week as the job might take or as he might work; in other words, that [17] the employment was for no definite, but for a fluctuating, number of hours per week.

### III.

The evidence was also insufficient to justify the court in finding that Thomas R. Belfield actually worked 591 overtime hours or any number of overtime hours.

### IV.

The evidence was insufficient to justify the court in adopting the formula it adopted to calculate the overtime due Thomas R. Belfield, if any, and the award to Thomas R. Belfield of the sum of \$2,174.88.

### V.

The evidence was also insufficient to justify the court in allowing to Thomas R. Belfield an additional equal amount of \$2,174.88 as liquidated damages.

The errors in law occurring at the trial, among others, were as follows:

### I.

The finding by the court that Thomas R. Belfield, in his employment by the defendant as assistant chief inspector, was not an executive or administrative employee and therefore exempt from the Federal Fair Labor Standards Act, and the finding by the court that he came under the operation of said Act and was therefore entitled to overtime.

The court also erred in finding that the said Thomas R. Belfield was employed on a basis of a 40-hour week or on any other basis than for an indefinite and shifting number of hours per week, and the court therefore erred in finding that, under the Act, Thomas R. Belfield was entitled to 1½ times his compensation for said overtime, if any overtime at all were worked, and the court also erred in finding that the amount due [18] said Thomas R. Belfield, if he worked any such overtime, was the sum of \$2,174.88, and also in allowing to Thomas R. Belfield an additional equal amount as liquidated damages. The court erred in making and entering its findings of fact in favor of Thomas R. Belfield and specially in respect to the matters just specified, and the court further erred in entering its conclusions of law No. II and in entering that portion of its judgment contained in the first paragraph thereof, granting to Thomas R. Belfield a judgment against the defendant, Webster-Brinkley Co., in the sum of \$4,349.76, together with attorney's fees in the sum of \$500.00 and the costs of suit herein to be taxed.

CATLETT, HARTMAN,  
JARVIS & WILLIAMS,  
Attorneys for Defendant.

Copy received Jan. 10, 1947.

LEO W. STEWART,  
CHAS. H. HEIGHTON,  
Attys. for Plaintiff.

[Endorsed]: Filed Jan. 10. 1947. [19]

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given that the defendant, Webster-Brinkley Co., a corporation, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that portion of the final judgment in the above entitled case affecting the plaintiff Thomas R. Belfield, and awarding him judgment against the defendant company in the sum of \$4,347.40, together with attorneys' fees in the sum of \$500.00 and the costs of suit, said judgment having been entered in this action on the 6th day of January, 1947.

CATLETT, HARTMAN,  
JARVIS & WILLIAMS,  
Attorneys for appellant,  
Webster-Brinkley Co.

[Endorsed]: Filed March 11, 1947. [20]

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[Title of District Court and Cause.]

### SUPERSEDEAS BOND

Know All Men By These Presents, That we, Webster-Brinkley Company, a corporation, as principal, and Hartford Accident & Indemnity Co. as surety, are held and firmly bound unto Thomas R. Belfield in the full and just sum of \$5,000.00, to be paid to the said Thomas R. Belfield, his executors, administrators or assigns; to which payment,

well and truly to be made, we bind ourselves and our successors, jointly and severally, by these presents.

Sealed with our seals and dated this 11th day of March in the year of our Lord One Thousand Nine Hundred and Forty-seven.

Whereas, lately at a District Court of the United States for the Western District of Washington, Northern Division, in a suit depending in said court between Thomas R. Belfield, plaintiff, and Webster-Brinkley Company, a corporation, defendant, a judgment was rendered against the said defendant and the said Webster-Brinkley Company having filed in said court a notice of appeal to reverse the judgment in the aforesaid suit, so far as it affects the plaintiff Thomas R. Belfield and awards a judgment to him against the defendant, Webster-Brinkley Company, on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, at a session of said Circuit Court of Appeals to be holden in San Francisco in the State of California.

Now, the condition of the above obligation is such, That if the said Webster-Brinkley Company, a corporation, shall prosecute [21] its appeal to effect, and satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award, if the defendant fail to make its plea good,

then the above obligation to be void; else to remain in full force and virtue.

[Seal] WEBSTER-BRINKLEY  
COMPANY,

By H. R. WASHINGTON,  
Asst. Treas.

[Seal] HARTFORD ACCIDENT &  
INDEMNITY CO.,  
Surety.

By GERALD L. PERRY,  
Attorney-in-Fact.

Presented by:  
FRED W. CATLETT,  
Attorney for Defendant.

Approved as to form and amount:  
LEO W. STEWART,  
CHARLES H. HEIGHTON,  
Attorneys for Plaintiff.

Approved, 3/11/1947.

LLOYD L. BLACK,  
U. S. District Judge.

[Endorsed]: Filed March 11, 1947.

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[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

This matter coming on regularly for hearing on March 3, 1947, on motion of the defendant for a new

trial as to the cause of action of the plaintiff Thomas R. Belfield, the defendant being represented by its attorney, Fred W. Catlett of the firm of Catlett, Hartman, Jarvis & Williams, and the plaintiff, Thomas R. Belfield being represented by his attorneys, Leo W. Stewart and Charles H. Heighton, and the Court having listened to the argument of counsel, and being fully advised in the premises,

It Is Hereby Ordered that defendant's motion for a new trial as to the cause of action of the plaintiff Thomas R. Belfield be and the same is hereby denied.

The defendant excepts to the entry of this order and its exception is allowed.

Dated this 14th day of March, 1947.

JOHN C. BOWEN,  
Judge.

Presented by:

CHARLES H. HEIGHTON,  
Of Counsel for Plaintiff.  
Thomas R. Belfield.

Approved as to form:

FRED W. CATLETT,  
CATLETT, HARTMAN,  
JARVIS & WILLIAMS,  
Attorneys for Defendant.

[Endorsed]: Filed March 14, 1947. [23]



[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING  
RECORD AND DOCKETING APPEAL

It appearing to the Court that notice of appeal was duly and regularly filed in the above-entitled cause and the transcript of the testimony immediately ordered but that it has been impossible for the clerk to complete the preparation of the record on appeal herein for the reason that the court reporter has not been able to complete the transcript of the testimony and that it is necessary that the time be extended within which the record on appeal may be filed and the appeal docketed in said Circuit Court of Appeals, the court being fully advised in the premises,

It Is Hereby Ordered that the time within which the record on appeal may be filed and the appeal docketed in said Circuit Court of Appeals be and it is hereby extended for a period of ninety days, or until and including the 9th day of June, 1947.

Done In Open Court this 17th day of April, 1947.

JOHN C. BOWEN,

Judge.

The above order is consented to and approved.

LEO W. STEWART,,

CHARLES H. HEIGHTON,

Attorneys for Plaintiff and  
Respondent.

Order presented by:

FRED W. CATLETT,  
Attorney for Defendant and  
Appellant.

[Endorsed]: Filed April 17, 1947. [24]

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[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH  
APPELLANT RELIES

Appellant, Webster-Brinkley Co., relies on this appeal upon the following points, to-wit:

1. The evidence was insufficient to justify the court in concluding that Thomas R. Belfield was not employed and worked for the Webster-Brinkley Co. in an executive or administrative capacity and was not exempt from the Federal Fair Labor Standards Act but was subject to said act and entitled to overtime under it.

2. The evidence was also insufficient to justify the court in finding that Thomas R. Belfield was employed at \$425.00 a month upon the basis of forty hours of work per week and it was insufficient to justify any finding by the court that the basis of employment was other than \$425.00 a month for such number of hours per week as the job might take or as he might work; in other words, that the employment was for no definite but for a fluctuating number of hours per week.

3. The evidence was also insufficient to justify the court in finding that Thomas R. Belfield actually worked 591 overtime hours or any number of overtime hours.

4. The evidence was insufficient to justify the court in adopting the formula it adopted to calculate the overtime due Thomas R. Belfield, if any, and the award to Thomas R. Belfield of the sum of \$2174.88.

5. The evidence was also insufficient to justify the court in allowing to Thomas R. Belfield an additional equal amount of [25] \$2174.88 as liquidated damages.

6. The court erred in making and entering its findings of fact No. III and IV, its conclusion of law No. II and its judgment against the defendant in the sum of \$4349.76 together with attorneys' fees in the sum of \$500.00 and the costs of suit.

Dated this 19th day of May, 1947.

CATLETT, HARTMAN,  
JARVIS & WILLIAMS,  
FRED W. CATTLETT,

Attorneys for Webster-Brink-  
ley Co., Appellant.

Copy received May 19, 1947.

LEO W. STEWART &  
CHARLES H. HEIGHTON,

By CHARLES H. HEIGHTON.

[Endorsed]: Filed May 24, 1947. [26]

[Title of District Court and Cause.]

### ORDER

It appearing to the Court that an appeal has been duly and regularly taken in the above-entitled case so far as Thomas R. Belfield is concerned and that the record on appeal is being prepared by the clerk of this court for transmission to the Circuit Court of Appeals of the Ninth Circuit and that the original exhibits are a necessary part of a proper record on appeal, the clerk of the above-entitled court is hereby

Ordered and Directed to transmit to the Circuit Court of Appeals of the Ninth Circuit as part of the record in the cause the original exhibits connected with the case of Thomas R. Belfield, to-wit: Plaintiff's Exhibits 1, 3 and 6, and Defendant's Exhibits A-1, A-3, A-8, A-9, A-10 and A-11.

Dated this 23rd day of June, 1947.

JOHN C. BOWEN,  
Judge.

Approved:

CHARLES H. HEIGHTON &  
LEO W. STEWART.

FRED W. CATLETT,

Attorneys for Plaintiff,  
Thomas R. Belfield.

[Endorsed]: Filed June 24, 1947. [27]

[Title of District Court and Cause.]

### STIPULATION

It Is Hereby Stipulated by and between Thomas R. Belfield, plaintiff and appellee, by his attorneys, Leo W. Stewart and Charles H. Heighton, and Webster-Brinkley Co., defendant and appellant, by its attorneys, Catlett, Hartman, Jarvis & Williams and Fred W. Catlett, as follows:

That the following parts of the record of the above case shall be included in the record on appeal:

1. The first cause of action of complaint (that relating to Thomas R. Belfield), first part of prayer, first part of verification, and Exhibit A.

2. Appointment and consent to substitution of attorney (June 27, 1946, File No. 7).

3. Answer, first part (that relating to Thomas R. Belfield), prayer.

4. Findings of Fact and Conclusions of Law (Belfield, File No. 18).

5. Judgment (File No. 19).

6. Defendant's motion for new trial (File No. 20).

7. Notice of Appeal (File No. 23).

8. Supersedeas bond (File No. 24).

9. Order denying motion for new trial (File No. 25).

10. The reporter's transcript of the oral testimony or a condensed statement in narrative form of such testimony to be [28] filed herein by appellant and, if the appellee be dissatisfied with that narrative statement, the testimony in question and answer form to be substituted for all or a part of said condensed statement.

11. Order extending time for filing record and docketing appeal.

Dated this 19th day of May, 1947.

THOMAS R. BELFIELD.

By LEO W. STEWART,  
CHARLES H. HEIGHTON,  
His Attorneys.

WEBSTER-BRINKLEY CO.,  
By CATLETT, HARTMAN,  
JARVIS & WILLIAMS,  
FRED W. CATLETT,  
Its Attorneys.

[Endorsed]: Filed May 24, 1947. [29]

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL

United States of America,  
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Wash-

ington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered from 1 to 29, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above-entitled cause as is required by stipulation of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the foregoing, together with the condensed statement in narrative form of evidence at the trial December 18, 1946, before Honorable John C. Bowen, United States District Judge, transmitted as part hereof, constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for preparing the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit: [30]

6 pages at 40c .....	\$2.40
25 pages at 10c (copies furnished) .....	\$2.50
Appeal Fee .....	\$5.00
	<hr/>
Total .....	\$9.90

I hereby certify that the above amount has been paid to me by the attorneys for the appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 2nd day of July, 1947.

[Seal]                      MILLARD P. THOMAS,  
Clerk.

By TRUMAN EGGER,  
Chief Deputy. [31]

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[Title of District Court and Cause.]

CONDENSED STATEMENT IN NARRATIVE  
FORM (EXCEPT WHEN DIRECT QUOTATIONS ARE MADE) OF EVIDENCE  
AT TRIAL DECEMBER 18, 1946, BEFORE  
HON. JOHN C. BOWEN, DISTRICT  
JUDGE

Charles H. Heighton and Leo W. Stewart Appearing for the Plaintiffs; Fred W. Catlett of Catlett, Hartman, Jarvis & Williams Appearing for the Defendant

By agreement, check stubs marked Plaintiff's Exhibit 1, and Defendant's Exhibits A-2 and A-3 were admitted in evidence.

Thomas R. Belfield, called as a witness by the plaintiff, having been first duly sworn, testified as follows: My name is Thomas R. Belfield, my address W. 3501 Pacific, Spokane, Washington. I am the plaintiff, and the defendant, Webster-Brinkley Co., is a corporation. My life's occupa-



tion is the machinery business, my trade is machinist's. I have acquired all the knowledge and skill for a rating in that department. I am known in the trade as a journeyman machinist and was such before the late war for about 14 years. I am married and have a family now living in Spokane. At the time the action was commenced, I was a resident of Seattle. I started to work for Webster-Brinkley Co. sometime in January, 1943. I was hired for shop inspector. My duties were to inspect machine parts and castings in the shop before parts went out for assembly. The Webster-Brinkley Co. was at that time, and particularly in November, 1944, and May, 1945, engaged in the manufacture of deck machinery for the Maritime and Navy. It was sent to different shipyards in all parts of the country. I worked directly upon those machines. During the overtime period, my work was mostly on the cargo winches. I also did inspecting work on anchor windlasses, planetary capstans and hydraulic steerers. I went to work in 1943 as an inspector. At that time, I think there were five other inspectors who did the same work as I. The executive officer in charge was Bill Lewis, Chief Inspector. I did no work outside the plant at that time as assembly inspector. Later on, I was transferred to the outside as outside inspector. An assembly inspector watches these different machines being assembled and sees that they are assembled right and that they work free. The plant was located in Seattle on Airport Way. The assembly inspection was inside that plant. Outside work was

the inspection of parts being made by machine shops and foundries on the outside, some in Tacoma, Portland, Aberdeen and Hoquiam, Port Angeles, Port Townsend, Shelton and Everett, and other places in Seattle outside of the Airport plant. Between January, 1943, and August, 1944, I did some work at those outside plants away from the main plant and at those various towns. I did inspecting work there of castings and parts to be assembled at the Webster-Brinkley Co. in Seattle. In August, 1944, there was a change made in the personnel of the Inspection Department of the Webster-Brinkley Co. I was brought in from the outside, at first to help out Mr. Fogman to reorganize the Inspection Department, that is, to acquaint him with the procedure. His title was Chief Inspector. I was known as the Assistant Chief Inspector. Mr. Fogman's first name was Harold. There was no other assistant chief. In August, 1944, and after I had been designated as Assistant Chief Inspector, my primary basic duties in the plant were more or less to look over the inspection reports in the morning when they came in and to work with the other inspectors inside the plant and outside the plant. If I remember right, there were around 14 or 15 other inspectors at that time. My ordinary day's work was as follows: I would generally come in at around 7 o'clock. Most of the salaried men came in around 8 o'clock, if I remember right, but I was always there around 7 and looked over the inspection reports that came into the office from the day before and sorted out

the ones that were in question and chased some of them down for engineering or handed them in to Mr. Fogman and he would take care of them. He had the final say-so on all of them. When I went there in the morning there were in the box rejected reports and OK'd reports—material coming in from the outside and also from our own shop.

Q. “Now, what independent, discretionary authority did you have over these reports, if any?”

A. “None.”

Q. “Did anybody else do the same thing that you did with regard to these reports?”

A. “Yes.”

I merely separated the ones that were OK from the ones that were rejected. They eventually went to Mr. Fogman, the Chief Inspector, from the girl. Her name is Mrs. Elliott. That probably took half an hour to one hour, at the most, in the morning. Then I went out in the plant and worked with the rest of the inspectors in the assembly line in the shop and in the warehouse. I covered mostly the plant, but was on the outside.

Q. “When you say you did the work of inspector, was it manual work or not?”

A. “Yes, it was inspecting tools.”

Q. “The same as the other 10 or 12 inspectors?”

A. “Yes.”

Q. “And you put in the length of an ordinary day doing that work?”

A. “Yes, a regular working day.”

Mr. Catlett: "I object to the question as leading."

The Court: "Sustained."

Q. "What percentage of the day would you say was spent doing the work of the other regular inspectors in the shop?"

A. "90%."

At that time, I had the title of Assistant Chief Inspector. At that time, they had green tags, yellow tags and red tags. They had red tags for the rejected material. Any inspector could tie a red tag on any part that was in question. With reference to the acceptances, the inspectors merely stamped an OK on the parts and sent them through, made out an OK inspection report and sent that through.

Q. "Mr. Belfield, regarding your authority upon accepting and rejecting, what were your primary duties or obligations thereto?"

A. "Well, if a part were too much in question, it was referred to the Chief Inspector. If he didn't give us an answer, he would go to the Engineering Department and get the answer directly from them. I was furnished with blue prints to guide me as to the way to inspect and what inspection should be made and what allowance should be made. There was also a manual furnished each inspector for the inspection of parts. He was required to be able to use it. The manual was set up by Mr. Thacker. I had nothing to do with the making of the blue prints. After August and up until November 15,

I worked for \$1.50 an hour, the same rate I was on on the outside, and then they put me on a monthly salary. Prior to that time of changing from the \$1.50 rate to the monthly rate, a Mr. Mimming was working on the outside with me. After I had gone inside, Mr. Burdge and Mr. Wallaston were working on the outside. They were classified as inspectors and paid on the hourly rate. I worked at various times with all of them. I did the same type of work that they did. We had certain parts to inspect at different shops in town that were being machined or being poured in those foundries—castings and weldments being welded up. We would merely go around and inspect them with the drawings, with our tools. When I arrived at a plant with, say, Burdge, we got our tools—the ones we needed to inspect with. We generally had our tools along and we inspected the parts to the drawing. I took some parts and he took other parts. Sometimes we would work together half a day and sometimes maybe it wouldn't be only an hour or so. On both the outside trips and those in Seattle, I was paid for my expense and I got car mileage for the operation of my car. I kept track of my mileage and turned in accounts for it. On about November 15, I had a discussion with Mr. Fogman relative to changing from this \$1.50 rate to the rate of a per month salary. He was the Chief Inspector from August on to November 15, 1944.

Q. "At that time, what conversation did you have with him relative to your salary?"

A. "Well, I didn't see where I was going to benefit from a monthly salary. Before that time—they had talked it over with me, and Mr. Fogman—if I would come inside for two or three months and then later I could go back on the outside. That was later on changed. They put me on a monthly salary anyway."

Q. "The conversation that you had with Mr. Fogman in November relative to your changeover to the inside, what was said by him as to the amount of hours you would work and what would be the basis of your working?"

A. "First, he wrote some figures down on a piece of paper—as to how much I was going to get an hour. He said there wouldn't be no overtime with that. Before I had been working long hours on the outside and inside after they had called me back in from the outside."

Exhibit 1 is my checks during August, September and some of the October checks prior to the time I went on a monthly salary.

The witness, asked to designate a few of the checks and the amount of hours and wages, said:

Here, it starts in the 9th month in 1944: 11 hours, 15½ hours, 12 hours, 15, 10 and 10. The 11th month, 1944: 11½ hours, \$19.88; 10 hours for the 7th, \$16.50; on the 8th, 11.3 hours, \$23.25—my mistake, that was 13 hours. And on the 9th, 13 hours, \$23.25; the 10th, 13 hours, \$23.25; the 11th, 10 hours, \$22.50; and the 12th, 11 hours—no, that is not right.

Q. "Mr. Belfield, how much overtime work did you work on the average?"

A. "Not quite so much as other weeks. Then, sometimes, I would be there until 10:00 or 12:00 o'clock at night and probably some nights longer."

Q. "What did he say to you and what did you say to him about your salary?"

A. "That I didn't have to work overtime, that the job would be easier than the outside and I could be home every night and I would get \$2.00 and something an hour. He figured it out. I don't know how he did it. It was a little more than \$2.00 an hour. At that time, I was getting pretty tired. I had been working long hours for about two years. From the time I went to work in January of 1943 until I retired in May of 1945, I missed but a few days but during the last year I never missed a day--during the time we were making the winch job. That was the hottest job. They needed that job out. I had a perfect attendance record that year."

Q. "After you went on the salary basis, what were your duties?"

A. "Well, more or less, just coming to the office in the morning and going through some of the reports and passing them on. I talked with Mr. Fogman and then worked with the other fellows during the day in the plant."

Q. "What was the difference in your work in the plant after August to what it had been before?"

A. "None. It was the same type of work outside of sitting there in the office for about an hour in

the morning, or half hour to one hour. That started in August. The duties after November 15 were just the same as prior to that. I was asked by Mr. Fogman to work overtime after November 15 and I had to do so. At that time we were frozen in our jobs.”

At that time, a statement of salary overtime starting November 19, 1944, was marked plaintiff's Exhibit 2 for identification and a Work Clearance and Referral was marked plaintiff's Exhibit 3 for identification.

The Witness (Continuing): With regard to signing inspection reports, I did sign reports of rejections and exceptions. Other inspectors did the same thing. I did not have authority to hire and fire employees in the Inspection Department. I was not consulted as to who should be hired and who should be fired. When I was away from the plant with Mr. Burdge, I did not tell him what to accept and what to reject. He followed the general direction himself. He knew more about the work on the outside at that time than I did. He worked constantly at that. After November 15, I did work overtime. If I remember right—I am pretty sure—I protested to Mr. McCarthy and several times to Mr. Fogman about it. I kept a record of the time I worked overtime. I did not ask the company officials to keep any record or to give me any record. Mr. Fogman and his secretary knew I was keeping a record of the overtime. I turned my overtime in to his secretary. I talked it over with her that I wanted her to keep track of my overtime and for her to turn it in—to me—from time to time. I



showed it to Mr. Fogman several times. He said he was going to take it up with Mr. McCarthy or Mr. Washington. They were officials of the Webster-Brinkley Co.

Plaintiff's Exhibit 2 is the overtime record in my handwriting. Plaintiff's Exhibit is an overtime record for the amount of overtime I worked. It is kept on the exhibit by the day, the month and the amount of overtime. I kept that record myself personally. During the time I was with Webster-Brinkley Co., I kept a record of my overtime even before I was on a salary. All hourly men generally carry a timebook or keep their overtime record from week to week.

Mr. Stewart: "I offer plaintiff's Exhibit 2 in evidence."

Mr. Catlett: "I object to its admission. In the first place, I would like to ask some questions with reference to it before your Honor even passes upon the question of admissibility."

The Court: "I will let you do that now, if you want to."

Mr. Catlett: "Mr. Belfield, what was the primary record that you made of your overtime?"

A. "Well, on one I kept a desk calendar, a loose leaf calendar and also a timebook."

Q. "Where is the desk calendar and where is the timebook?"

A. "We have got part of it. The wife had part of it. We took it all together and put it on this sheet."

Q. "That sheet, then represents a tabulation taken from other enteries?"

A. "Yes."

Q. "Where are the original enteries?"

A. "I have the timebook at home in Spokane. The other one the kids tore up—painted pictures on them and different things."

Mr. Catlett: "If your Honor please, I am going to object to the entry of this secondary evidence. We are entitled to have the original enteries if they can be produced and part of them can be produced."

The Court: "When did you make this record, you and your wife?"

The Witness: "That was right after I quit Webster-Brinkley and went to Western Gear."

The Court: "You didn't make up this daily as a part of your daily work and routine, this record?"

The Witness: "No."

The Court: "The objection is sustained."

Mr. Stewart: "Do you know how many hours of overtime you worked, Mr. Belfield?"

A. "Yes."

Q. "Will you please state how many hours of overtime you worked between November 15, 1944 and May 15, 1945?" [8]

Mr. Catlett: "Of course, that question means, I assume, how many he worked as he can testify now of his own knowledge, separate and apart from any record of figures that he has there."

The Court: "It is so ordered—that he can re-

fresh his recollection from figures of the character mentioned a few moments ago.”

A. “There were three days that I remember in one week that I had worked—on one day I had worked the clock around. I worked 24 hours.”

The Court: “Mr. Reporter, will you read the question?”

Q. “Will you please state how many hours of overtime you worked between November 15, 1944 and May 15, 1945?”

The Court: “If you know, state that and not something else.”

Q. (By Mr. Stewart) “State the number of hours you worked.”

A. “I have 300 and some hours in the timebook at home.”

Mr. Catlett: “Now, your Honor——”

The Court: “The objection is sustained. You will have to answer the question—not some other question.”

Q. (By Mr. Stewart): “Just state how many hours you worked, the total number of hours you worked.”

A. “I can’t answer that.”

Mr. Stewart: “Your Honor, I will have to ask to withdraw the witness from the stand at this time.”

The Court: “You may do so.”

Mr. Stewart: “Will you step down, please?”  
(Witness excused.)

Mr. Stewart: “I will recall the same witness.”

Mr. Catlett: "If your Honor please, I object."

The Court: "There was no request made to have the witness resume the stand after conferring with the witness."

Mr. Stewart: "The witness is a working man. He does not know the workings of the law. When I asked if the witness could step down, I thought it was understood that I could interrogate him."

The Court: "I didn't so understand."

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### LLOYD M. BURDGE

called as a witness by the Plaintiff, being first duly sworn, testified as follows: My name is Lloyd M. Burdge, my address 3907 Morgan St., Seattle, my occupation machinist. I have worked at that 20 years. I am acquainted with Mr. Thomas Belfield. I was employed by the Webster-Brinkley Co. for 5 years from 1941 to 1946. Originally, I worked in the shop as a machinist for a period of about 2½ years, then I worked as a leadman in the shop for a little better than a year and the last of my time I spent as an inspector. Chiefly, my work was with the outside inspectors. Most of them were located here in Seattle, some of them were out. I made trips to Tacoma and to Everett. I was paid an hourly rate of \$1.50 an hour. I got overtime after eight hours a day, regardless of the week. There was nobody over me when I went away from the plant to inspect. I was my own boss when I was away from the plant. When I went away to the outside jobs I

always took with me the necessary blueprints of the parts we might have to inspect and the necessary tools or instruments we would need to check the measurements with. I had the responsibility of accepting or rejecting on my own as to whether it would pass or not. If it didn't pass, I tagged it with a reject tag and made a report to that effect. I had that authority from the company. There were a number of occasions that Mr. Thomas Belfield went with me.

Q. "What percentage of the time do you believe between November, 1944 and May, 1945 he might have been with you on these jobs?"

Mr. Catlett: "If your Honor please, I submit that that is an unintelligible question. He testified that Mr. Belfield went with him on a few occasions. He didn't say anything that would give us a base for estimating the percentage—such a percentage as we have in this case."

The Court: "The objection overruled."

A. "Well, there were times when Mr. Belfield would go with me and we might work an entire day together. There were other times that we might call on the supplier and there would be a couple of hours work. I would say that possibly 10% of the time he spent with me."

I would say that would be about right on these outside jobs. When he went with me, if they were large, cumbersome parts, we would work on the same part to check. At other times, he would be checking the same identical part, doing the same

thing I was doing. That practice was followed each time we went on these jobs.

Q. "Will you explain how you inspected, if you will—how you used your instruments."

A. "We had prints. Tolerances were given on the prints that the parts were to conform to. We would measure with micrometers for the sizes to determine if they were within the specifications."

Lots of pieces were large and it wouldn't be possible for one man to turn them over, to pick them up or do any handling that you might have to do to check them. Mr. Belfield was engaged in the same kind of work that I did in lifting and turning these parts around. When I was handling a large cumbersome piece, he helped me in turning and testing it. He followed that practice during all of the time that we would be on the job together. On these trips away from the plant, I was allowed costs for operating my own car from the plant. Sometimes I rode with Mr. Belfield and sometimes he rode with me. It would just depend upon whose car was handiest. If it was my car, I turned in an expense account. If I used Mr. Belfield's car, I would turn in his account.

On cross-examination, Mr. Burdge testified: I worked with Mr. Belfield when he was an inspector. My testimony was concerned with the time he was inspector. From the time that I came into the Inspection Department, he had the title of Assistant Chief Inspector. When we made an inspection, we did not always make a report. The reports were made only on rejected material. When made on rejected material, I signed them. I placed them in

the office. They had a basket to place the reports in. On the rejected materials, they were usually next considered by Mr. Belfield. So far as I know, he checked them over to see if they were made out correctly, that is, whether I had made an error in my pencil work on them, and they then went to the girl to be typewritten on another form. Very rarely did Mr. Belfield check to see whether or not the materials really should be rejected. I can't say I recall of him ever doing that."

Q. "Didn't questions frequently arise as to whether or not materials should be rejected or were usable?"

A. "Yes, sometimes, if they were very near to the tolerances on the print, the discussion did come up as to whether they could be used or passed."

Q. "When you say that your judgment on a matter was final, isn't it true, as a matter of fact, that many cases did go beyond you to Mr. Belfield or to his superior for further action?"

A. "That is true, if it was a questionable part. If it were definitely beyond print dimensions, why, I would write a reject on it and it was accepted that way without any further question."

There were also government inspectors on these jobs from time to time. They also might reject. If they rejected, the part was scrapped then. We had no recourse after the government inspectors rejected it.

Q. "Let me ask you if Mr. Belfield didn't frequently check up on parts rejected by the govern-

ment inspectors to see whether or not they agreed with them or whether the parts could be used?"

A. "Well, I wouldn't know about that because most of my time was spent with the outside inspectors and if they had any such discussions with the Navy or Maritime inspectors, they were at the plant and I wasn't present."

Q. "The inspections you made were what might be called original inspections, weren't they?"

A. "Yes."

Q. "That would be the first inspection made by anyone connected with the Webster-Brinkley Co.?"

A. "Yes, that is true."

Q. "It was necessary to keep your inspectors in these suppliers' plants in order to see that the materials that came down to the Webster-Brinkley Co. were satisfactory, wasn't it?"

A. "That is right."

Q. "They frequently had a good deal of trouble over defective parts or parts that did not come up to specifications, isn't that true?"

A. "Occasionally, there was not an awful lot of that."

Q. "Did you ever see Mr. Belfield coming down to reinspect parts?"

A. "I believe I have asked him to come down. We used to get castings sometimes that were faulty—that had cracks or were poor castings and I was doubtful as to whether they could be used. I used to ask Mr. Belfield to come down and look at it."



On redirect examination, Mr. Burdge testified: I had authority to talk with the Engineering Department. I was free to go to the Engineering Department at any time with questions. If a part didn't come up to specifications, I could go direct to them and ask them whether to pass it or not. I have done that on a number of occasions.

Q. "Did you say that frequently you have done that?"

A. "Well, those things didn't come up too often, but I have done that."

On recross-examination, Mr. Burdge testified: I was using the blueprints made by the Engineering Department.

Q. "So that would be the natural place to inquire concerning the blueprints and whether or not a particular part would qualify, wouldn't it?"

A. "Well, not always, if the Chief Inspector was in the office I would go to him. Quite often, maybe, this thing had been acted on in the shop with this same identical piece or had been acted on by the engineers."

Q. "But you weren't under the Engineering Department at all?"

A. "No."

Q. "You were supervised entirely by Mr. Belfield?"

A. "And Mr. Fogman. Mr. Fogman was the Chief Inspector."

## ROBERT S. EDMISTEN,

called as a witness by the plaintiff, being first duly sworn, testified as follows on direct examination: My name is Robert S. Edmisten. I am a mechanic. I am acquainted with Thomas R. Belfield and worked with him for quite some time. I did not work for him for the full period in the Webster-Brinkley plant between November 15, 1944 and May, 1945. I worked for him part of that time—with him and when I went on as a leadman, they asked me to work with him on inspection, due to the fact that I had worked on inspection and when I went on as a leadman we could work along with each other. I did work as inspector then in the Webster-Brinkley plant for a year. Then I was transferred to the leadman of machinists. While I was leadman, they asked to me work also with the inspector. When I was working in the Inspection Department, there were approximately 10 men and one or two women in it. I was working inside the plant as an assembly inspector. My job was to inspect the assembly of machines and see that they would pass the Maritime or Navy inspection properly assembled. While I worked as assembly inspector, I saw Mr. Belfield engaged in the same thing. I have never seen him walk through the shop that he didn't have some work of that type before he went through. I was there practically every day during the period from November, 1944 to May, 1945.

Q. "Did you see Mr. Belfield there practically daily during that time?"

A. "Well, at first he was on the road and I would see him about three or four days a week, possibly, around the plant."

By on the road, I mean outside the plant. When he was working in the plant on the days I was there, he would be doing the same class of work I would be doing which would be accepting or rejecting parts that went into the machinery. While he was in plant, he would be engaged in that kind of work about 75% of the time, as near as I could figure out. When he inspected as I did, he used our precision tools used to check depth and tolerances. I had authority to put a reject on an article if it didn't meet specifications. All the other inspectors had that right. If it didn't pass inspection or I was doubtful about it, I had two things I could do. On some inspections, like the gears of the winch jobs, if the Maritime inspector was there and if he thought it could be reworked on the floor, why, he would give me authority to go ahead and have it welded or fixed or whatever the procedure would be on it. On some things that he had no connection with, I would just send my rejects through and then it would go into the inspection office. I would give it to the secretary. I had authority to consult the Engineering Department upon the result of my inspection and I did so. I had in my possession each day that I worked in the plant blueprints and a manual of works procedure. With those, I guarded myself as to my inspections. When I first went to work, the Chief of the Inspection Department was Earl Rulofson. Later on, I worked for Hal Fogman. I consulted

Mr. Fogman. I sometimes consulted Mr. Belfield on allowed tolerances to see if they would pass.

Q. "If a novel question came up and you requested Mr. Belfield what would be the result of that inspection; what did he do about it?"

A. "Well, he would say, 'Well, let's go over and take a look at it', and he would take his prints and tools required. He would look at it and say, 'Well, maybe we had better make a report on it and have Fogman or Engineering come down and take a look at it or the Maritime inspectors'."

On cross-examination, Mr. Edmisten testified: I worked at Webster-Brinkley Company about seven months. I was in the Inspection Department for about five months and then went in with the winch job in June, 1944. I was in the Inspection Department beginning in 1943 and until June, 1944. At that time, I became a leadman and was asked to work with the inspectors, and I rejected and worked in gears after that time, too. As leadman, I was posted on the assembly. I would not know only about inspections that were made there in the assembly. We had the opportunity to walk through the shops into the machine shops and were called in by Inspection and asked by Inspection to go over and look at a part, and see if we could use it on any piece of equipment; go right straight to the inspection table or to the machine at any time we wanted to. My instructions did come from Hal Fogman. I never did have an order from Belfield. Fogman was often absent but I never had to get instructions

from Belfield. I was asked to work with Inspection, carrying a leadman's rate. I did make inspections myself and I did sign inspection reports. There is more than one type of inspections. There is the inspection of a machine product coming off the the machines or there is the inspection of the completed machine after it is ready and being assembled. After it has passed the first inspection, if it is rejected, whether it goes up to the inspection, if it is depends upon whether that rejection can be reworked in the machine shop and not have to go to the inspection. For instance, we may find a crooked shaft or something like that. Anybody that was a machinist could figure out whether it can be reworked or not. I could or a machine shop foreman or anybody could determine whether or not a piece was to be reworked. Anybody was entitled to rework. I didn't have to have any written authorization on small cases. On larger cases, the Maritime mostly on my deal, would come around and say, "Well, we can rework this," or "Let's have it thrown out", then I would make my report, put the red tag on it and send it to the girl in the inspection office. I wasn't with Mr. Belfield all of the time, but when he was in the plant, a large part of the time. He was, however, often out of the plant. On two or three different trips I went with him to Seattle to see if something could be used in the line or not for tolerances, to see if something which had been a reject could be used on the line. Say something had a tolerance of a 2 thousandths in the machine shop. I had worked on this prior to my time in inspection. I had been a machinist on the floor. Sometimes they would ask me to ride along with

Belfield to see if that part could be used. I did not go along really as the expert specialist. There are a lot of those things where you might be working on one thing here and I am working on something else over here. You might be asked to look at something that goes on my line. It wouldn't work so they would ask me to go over and help you out and ask me if that would work. When, seeing Mr. Belfield on the floor a lot of times, I would ask his advice—should we use it or shouldn't we use it. That would be about all.

Q. “Weren't there always questions of rejections and reworks where you would have to come out and decide the matter for the Inspection Department?”

A. “No.”

THOMAS R. BELFIELD,

recalled as a witness on his own behalf, testified as follows on direct examination: I have never been a witness before. I was on the stand here this afternoon and was asked a question regarding the overtime that I worked.

Q. “Were you confused as to the questions that were asked you pertaining to it?”

A. “Yes, sir, I was.”

Q. “What was the confusion in your mind?”

A. “Well, I thought I couldn't answer that question on that overtime—the total amount of overtime that I had. I didn't think I could answer that the same as it was on the paper.”

Q. “From the ruling the court had made and from what was said?”

A. "That is right."

Q. "Well, did you know personally and of your own knowledge without reference to the exhibit before you what your overtime was?"

A. "Yes."

Q. "Did you know?" A. "Yes."

Q. "And you know now, do you?" A. "Yes."

Q. "What is it?" A. "591 hours."

Q. "Would you say what period of time that was?"

A. "That was from November 15 until along about May 15."

The Court: "What year, November 15 of what year?"

The Witness: "1944."

The Court: "To May——"

The Witness: "1945."

The Court: "The total was what, as you stated just now?"

The Witness: "591 hours."

Q. "What was your basic week, Mr. Belfield?"

A. "Well, while I was at \$1.50, it was supposed to be 40 hours. We got paid for overtime over 40 hours. After we went on salary, I think it was supposed to be 44 hours."

Q. "A 44-hour week?"

A. "Yes."

Q. "This overtime is computed on that basis, is it?"

Mr. Catlett: "If your Honor please, I object to that as leading."

The Court: "Sustained. You may ask him how it is computed."

Mr. Stewart: "You may cross-examine."

On cross-examination, Mr. Belfield testified:

Q. "Mr. Belfield, can you tell us the total number of hours you worked in any single day or in any single week between November 20, 1944 and May 12, 1945?"

A. "Any single day or any single week?"

Q. "The question is any single day or any single week."

A. "Yes, from that paper that I turned in."

Q. "You have no recollection apart from that paper, have you, of the time that you worked?"

A. "No, I don't believe I could. That has been quite a while ago."

As inspector, it was one of my functions to make inspection reports. In August, 1944, I was brought in to the Inspection Department merely to help Mr. Fogman out—to acquaint him with inspection. The department was reorganized but not by me. I would say there were between 10 and 15 inspectors in the department, not more than 15. I don't know whether or not there were any junior inspectors. I have never seen any classifications. There was one helper that I know of. I think there was only one clerical helper. Mr. Fogman was absent at times. I was not the acting chief of the department when he was absent. I think Mr. McCarthy was. I mean Mr. McCarthy, the General Manager of the plant. As Assistant Chief Inspector, my functions were that I



would come in in the morning and look over the inspection reports. Inspection reports that had been typed up and wrote up the day before made by other inspectors and by myself. There was a difference in the type of report made by me that I signed and the type of report made by the inspector. The difference between those two types of reports was that some of them were typed and some of them were pencilled. One was what they called a pencilled form and the other was a typewritten form. I didn't make reports where I reinspected parts—machinery, unless it was something that was pretty bad. Generally, we would get the Engineering Department in on it or the Chief Inspector. The inspectors generally signed their reports. When I made an ordinary inspection report, I signed it. The files and records ought to contain the ordinary inspection reports which I made during this period of time. There was different treatment if the report came in reporting the part OK or if it rejected the part. The difference was that most all of the OK'd reports were sent through to the girl to be typed up without even looking at them. The rejected reports were gone over by Mr. Fogman and myself and Engineering at different times. The reports that were favorable were typed up by the girl and signed as a mere formality.

Q. "Did you ever sign any of those?"

A. "Yes."

Q. "In fact, you signed all of those when Mr. Fogman was absent, didn't you?"

A. "Yes, and there were other inspectors that signed those, too. Mr. Wallace signed them."

Q. "Mr. Wallace would approve them, do you mean?"

A. "Yes, also the secretary there. She would OK them."

Q. "You were talking about the OK'd reports?"

A. "Yes."

Q. "All of the others came to you or Mr. Fogman?"

A. "No."

Q. "Where did they go?"

A. "Well, sometimes Mr. Fogman would have them. Sometimes I would have them. Sometimes expeditors would come in and get them and take them directly up to Planning or Engineering and they were taken care of there."

Q. "Well, you would necessarily on matters of that sort have to take the advice of Engineering, wouldn't you, especilly as to whether they could be reworked?"

A. "Not necessarily Engineering. We could take the advice of the shop men or the leadmen in assembly or the assembly foreman."

It was the function of Mr. Fogman and myself to adjust that matter in some fashion and determine whether or not rejected parts could be reworked or whether anything could be done with it or whether it should be simply cast aside.

Q. "Now, of course, would you go out sometimes and reinspect these parts yourself to see if you thought the original inspection was an error?"

A. "No, not necessarily. I never had the time to do that."

Q. "You never did that all?"

A. "Well, on certain occasions I did, yes."

Q. "And, of course, if you did that, you had to take the measurements, didn't you?"

A. "I hardly ever reinspected other inspectors' work. Most of them there, that we had working for us, were men that could read prints."

No disputes ever arose between our inspectors and the government inspectors. No disagreements as to whether or not a particular part qualified. That would be up to the assembly man or the assembly foreman or the plant superintendent.

Q. "Do you mean to say there were no differences of opinion between the inspectors of Webster-Brinkley Co. and the government inspectors over parts?"

A. "Well, yes, there would be certain things come up like that but on assembly that was handled by the leadman or the plant superintendent or the assembly foreman. Parts that we got into the warehouse from the outside or the shop, that was handled by Mr. Fogman or Engineering—mostly Engineering, whatever engineer was assigned to that particular job."

Q. "Didn't they at times get up to you, too, especially in Mr. Fogman's absence?"

A. "Yes, but we never had any final say-so on that. It would be up to Engineering."

Q. "Were you ever in on any conferences with the General Manager or the Works Manager or the

heads of these other departments in connection with some of these difficulties which arose?"

A. "Yes, once."

Q. "You remember one. Only one?"

A. "Yes."

That arose over a statement that I made that a jig should be built to set these gears into to get your clearance and the Maritime man misunderstood me. He said, "We built some jigs that way and decided to throw them away because the gears weren't any good; it wouldn't match on the jigs." I have been in ill health for the last three years. It has not been continuous. It started before I left Webster-Brinkley.

Q. "There was nothing in the world to prevent you from resigning from Webster-Brinkley, was there?"

A. "Yes."

Q. "Well, you know perfectly well a lot of men did quit?"

A. "Yes, I did. I asked to get out of there two or three different times, from Mr. Fogman, and he told me Mr. McCarthy wouldn't give me a referral."

Q. "You were now asking for a referral to some other job. You could have quit any time you wanted to?"

A. "Yes, but I couldn't take on another job unless I had a referral."

Q. "You could, however, under the regulations of the Manpower Commission, have forced a referral, couldn't you—especially on the reason of ill health?"

A. "That is what I was going to do until they told me I could go to Western Gear. Rusty Callow told me if I could go to Western Gear, he could get a referral for me."

Q. "But you know you could have forced a referral at any time that you wanted to go to the Manpower Commission and present your case, didn't you?"

A. "I had heard about so many going up there and presenting a case like that and they never got anywhere."

Q. "Did you say that you protested the fact that you weren't getting overtime to Mr. McCarthy?"

A. "No, to Mr. Fogman."

Q. "Oh, to Mr. Fogman. What did you say you protested to Mr. McCarthy?"

A. "I protested to Mr. McCarthy just about every day there for about two months."

Q. "For what?"

A. "Well, for different things in the Inspection Department."

Q. "Oh,—other matters, not this question of overtime?"

A. "Overtime, yes."

Q. "Isn't it a fact that you never made any claim to overtime until you made it after you quit work and quite a time after, as I recall it, to Mr. Gregson?"

A. "Yes. If I remember right, it was six months after I had left Webster-Brinkley and was working for Western Gear."

Q. "That was the first time that you had ever had presented a request for overtime, wasn't it?"

A. "That was the first time I had made any request under this law."

Q. "You testified, I think, on your direct examination, that Mr. Fogman told you when he made the arrangement with you to be Assistant Chief Inspector at \$425.00 a month, there would be no overtime."

A. "Yes."

Q. "As a matter of fact, you took the job knowing you would have to spend whatever amount of time the job called for to do it right, didn't you?"

A. "No, because they were reorganizing the Inspection Department and they were going to get better and more men all of the time."

Q. "Nevertheless, you knew that you would have to work some overtime, didn't you?"

A. "No, I didn't know anything about it at that time."

Q. "Well, you anticipated it, didn't you? You had been being paid by the hour?"

A. "But I was working on the outside when I was paid by the hour—outside and inside part of the time."

Q. "But you did work overtime of your own free will, didn't you?"

A. "Well, yes, the work had to be got out of there. There was a certain amount of work that had to be gotten out so it wouldn't stop the line. Somebody had to do it."

Q. "Surely. Didn't all the supervisory officials work overtime?"

A. "No."

Q. "Are you sure? About that?"

A. "Yes."

Q. "You are quite sure of that?"

A. "Yes."

Q. "You came and went as you pleased during the day, did you not?"

A. "No. I had to have a slip signed by Fogman to get out of the place."

Q. "Supposing Fogman wasn't there?"

A. "He signed them and gave the office girl a bunch of them to keep in her desk drawer to be issued when we went out after we told her what it was for. We had to put our reason and what time we went and what time we returned."

Q. "You could readily do that, couldn't you?"

A. "I suppose we could."

On redirect examination, Mr. Belfield testified: I think everybody in the plant knew I was working this overtime and I protested to everybody I seen there, toward the last, to Mr. McCarthy and Mr. Fogman, mostly Mr. Fogman. After I left the company, I went to Western Gear. Mr. Bannan was president of Webster-Brinkley and he was also connected with Western Gear. After I was out of that, I brought this action for overtime and made demand in that fashion.

On recross-examination, Mr. Belfield testified: I did not get my pay or paychecks from Mr. Fogman. He was my superior, though. I didn't ask Mr. Fogman to pay me for any overtime.

The plaintiff rested.

Mr. Catlett: "I desire to make a motion to dismiss the case as to Mr. Belfield. I don't think there

has been sufficient evidence presented by Mr. Belfield himself to justify your Honor in granting any judgment of overtime for Mr. Belfield. I think you might dispose of it now and shorten this matter and then proceed with Mr. Foster's case."

The Court: "I am not prepared to take that view of it at this state, and the motion is denied."

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### HERBERT R. WASHINGTON

a witness on behalf of the defendant, being first duly sworn, testified as follows on direct examination: My full name is Herbert R. Washington. I reside at Medina, Washington. I was during the time in question in this case and am still Assistant Treasurer of Webster-Brinkley Co. As Assistant Treasurer, matters of securing authority from the governmental departments such as the Stabilization Unit and the Bureau of Internal Revenue fell within my jurisdiction.

Letter and application marked defendant's Exhibit A-8 for identification was then produced. The witness, continuing: Defendant's Exhibit A-8 for identification is an application made to the Salary Stabilization Unit by the Webster-Brinkley Co. It affects John Foster and Thomas Belfield. On the reverse side is the official action of the Stabilization Unit. It is the original received by Webster-Brinkley Co. from the Stabilization Unit.

(The court reserved ruling on admissibility.)

The witness, continuing: I did not have any direct



connection with Mr. Belfield. I have secured and brought up here the inspection reports made by our inspectors during this period of time. They are contained in two large cases which you see here in the courtroom. At Mr. Catlett's request, I went over personally those inspection reports. They are the official records of the Webster-Brinkley Co. I think they are the actual and original inspection reports submitted to Webster-Brinkley by its various inspectors during this period of time. I checked all of those reports to ascertain how the inspection reports were signed by either Mr. Fogman or Mr. Belfield during the period from November 16, 1944 to May 15, 1945.

(A tabulation of inspection reports marked defendant's Exhibit A-10 for identification was produced.)

Mr. Catlett: "As I stated before, if your Honor please, I have the originals right here in the courtroom. Of course, they are so numerous it isn't feasible to introduce, I suppose, the whole bunch. For that reason, I asked Mr. Washington to make this personal check and tabulation for the benefit of the court."

The Court: "Do you now tender these records which you claim are original records to inspection by plaintiffs?"

Mr. Catlett: "Yes, I do. Plaintiffs are quite at liberty to inspect the original records."

(At his request, Mr. Stewart was permitted

to make preliminary examination of the witness.)

On examination by Mr. Stewart, Mr. Washington testified: I examined the inspection reports only from November 16, 1944 to May 15, 1945. The report shows the original inspector. I have got a number of these inspection sheets that are signed by other inspectors in the department. The inspection reports showed that where the lot of goods inspected was approved, it was then not signed for approval by either Mr. Belfield or Mr. Fogman personally but was initialled only with the initials "HF" by the secretary, as Mr. Belfield testified. It was only those inspection reports that showed rejections that were then actually signed by either Mr. Fogman or Mr. Belfield and this list refers only to the rejected reports signed personally as approved by Mr. Belfield or Mr. Fogman. It does not refer to the inspection reports that were OK but were not signed personally for approval. I would not know the number of inspection reports in the period of time worked. It is about a case and one half of them there. I have no idea how many. I have gone through the file but I did not take out the Fogman and Belfield reports. I have tabulated only those reports which, because they showed rejection, had to come before either Mr. Belfield or Mr. Fogman for their approval. So far as the procedure down in the Inspection Department, I know only what I have learned from the file. The other inspectors in the department besides Mr. Belfield

did not sign approval of rejection slips. I understand that they did not have the same authority as Belfield to sign rejections.

On further examination by Mr. Catlett, Mr. Washington testified: I will step down and take out of the file one of these reports to which I refer so that we may all know what we are talking about.

The Court: "Pick out a group of them."

Q. (By Mr. Catlett): "Yes, pick out a group of them."

The Court: "And display them in the presence of counsel for plaintiff."

The Witness, continuing: This document which I have in my hand and have just removed from the filing case is a folder containing a quantity of inspection reports. The top one is numbered 28000 dated December 2, 1944. It contains information as to the material, the number, the vendor—Pacific Wire & Steel Co.—our job number, the purchase order number, the receiving report number and shop rejection on four parts. It shows that the first inspection was made by inspector O'Neil. Because it is a rejection, it is initialled in Mr. Belfield's handwriting "TB". The next one is number 28001. It shows dated 11/30/44. It shows from Pacific Wire & Steel, that it was a brake band assembly, that six were inspected, that the inspector was Holt. The Chief Inspector was supposed to sign it and because it was accepted, the girl had signed "HF"—Harold Fogman. The next one is 23003. It shows "acceptance", also signed with the initials "HF" and shows the inspector Wallaston. Here is

one 28005. It shows Westinghouse Electric Company, electric motors, one rejected. It shows that Shadix was the original inspector and because it was rejected, Mr. Fogman has signed "F-O-G-M-A-N."

Mr. Stewart: "If your Honor please, at this point I think it would be well—I think I understand it—to give an opportunity the first thing in the morning, probably because court starts in order not to lose any time, to come and look at it and then I think our objection may be withdrawn or renewed, depending upon what the circumstance is."

The Court: "I think that is a privilege that should be granted."

The Witness, continuing: Referring to defendant's Exhibit A-10 for identification, this list deals only with those that show rejections and were therefore signed by Mr. Belfield or Mr. Fogman. It does not include any reports that were accepted—reports where nothing was the matter.

The Court: "Mr. Witness, defendant's Exhibit A-10, the one preceding this, was that summary which you made up from the information gained by your perusal of this file and similar files, was it not?"

The Witness: "That is correct."

The Witness, continuing: Defendant's Exhibit A-11 is one of the official files of the Webster-Brinkley Co. of the inspection reports and approvals by the inspectors in charge.

(At his request, Mr. Stewart was permitted further preliminary examination.)

The Witness, continuing: As Assistant Treasurer, I made it my business to find out the operation of the Inspection Department. Each one of the inspectors when they made a report, made it themselves, and they signed that report rejected or approved, and that was turned in each day. That recapitulation is made from that record. The stenographer wrote this from the report turned in by the inspector. Because it had to be copied to go to different departments, that became the official one. That record merely means that Mr. Belfield signed a typewritten report as Chief Inspector. It doesn't mean that he made the inspection or rechecked the inspection. It meant that the Chief Inspector had to countersign all the forms that showed rejections. My understanding was that in numerous cases, it was Mr. Belfield's job to go out to the shop to check and make sure that it was correct. My understanding from all that were there is that that was his job. I did not see him do it. It is not a fact that before he was made Assistant Chief he signed the very same type of documents as I have in Exhibit A-11. I do not have those records here. Mr. Wallaston was acting head of the Inspection Department before Mr. Belfield's tenure of office.

The Court: "So this is the original so far as Mr. Belfield is concerned."

The Witness, continuing: In going over these reports, I did not find during this period of time any of these reports on which Mr. Belfield was listed as the man who made the original inspection.

I did not find during all of that period of time any of those reports where the approval was signed by anybody except Mr. Fogman or Mr. Belfield.

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THOMAS R. BELFIELD

recalled by the defendant, testified as follows:

Q. "Mr. Belfield, calling your attention to defendant's Exhibit A-11 and to the place on there where the signature is to be found, or the signature of Mr. Fogman, can you tell the Court when the signatures were placed thereon?"

A. "That was done the first thing in the morning."

Q. "Of each day during the time of your employment?"      A. Yes."

The Court: "That answers the Court. Was it a part of your daily work?"

The Witness: "Not necessarily. I was gone out of the plant, oh, lots of times—gone for two, three or four days at a time, on other jobs on the outside."

The Court: "If you were there, was it or was it not a part of your daily work?"

The Witness: "Yes."

The Court: "The objections are overruled. Defendant's Exhibit A-11 is now admitted. For the convenience of the Court and all of those connected with the trial, the Court thinks that it is proper to receive in evidence the summary of inspection reports in order to avoid the necessity of examining each inspection report separately. If it is contended

by plaintiff's counsel that all of the original inspection reports of which defendant's Exhibit A-10 is a summary have not yet been brought into court for inspection by plaintiff's counsel, the Court will hear you further."

Mr. Stewart: "I assume, your Honor, that this tabulation made by Mr. Washington—that he testified personally he made it from the files—on that testimony I am not going to insist that I examine them as to the correctness of it. If the exhibit is proper, I won't raise that ground.

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### HERBERT R. WASHINGTON

continuing, testified:

The Court: "Mr. Washington, I know you testified at some length about it last night, but what is the fact about whether or not you have brought all of the original inspection reports, of the character like those contained in defendant's Exhibit A-11, into court and are now present in court available for the inspection of all who might wish to inspect them?"

The Witness: "The two cases there contain all of this type of inspection report from a little before November 16, 1944 until a little after May 15, 1945."

The Court: "Does your summary of inspection reports which is now marked defendant's Exhibit A-10 contain in it any information not included in these original reports which are here now in court in two files?"

The Witness: "It does not."

The Court then admitted in evidence defendant's Exhibit A-10 and defendant's Exhibit A-11.

The Witness continued: After Mr. Belfield was hired, he was paid for a portion of the time on an hourly rate. That was during that early period. Mr. Belfield continued to be paid upon an hourly basis because he had been paid upon an hourly basis and because we had had no such position as Assistant Chief Inspector up until that time, and it was the ruling under the Wage Stabilization Regulations that you could not change a rate from an hourly rate to a monthly rate for a position which had not previously existed without application and approval of the Salary Stabilization Unit and we therefore had to continue to pay Mr. Belfield on his old basis until such approval was received. An application for such approval was made to the Wage Stabilization Unit and a ruling was subsequently received thereon. Defendant's Exhibit A-9 for identification is the application and the ruling of the department upon the case of Mr. Belfield. I am sure that this matter was taken up with Mr. Belfield. In November and December, 1944, the plant was on a 6-day basis. That was, I think, because it was mandatory under the manpower regulations and the executive order of the President. I think the plant was on a 48-hour week basis until about August, 1945, approximately the end of the period in question here. As to the clerical employees, most of them were working 44 hours through a permit that had been received from the War Manpower Commission for clerical employees.



On cross-examination, Mr. Washington testified as follows: I did not say that the application made to the Wages & Hours people was brought to the attention of Mr. Belfield. I was Treasurer at one time and later made Assistant Treasurer. My salary was fixed by the Stabilization Unit, but not before I went in as Assistant Treasurer, because I was Assistant Treasurer before there were any wage regulations.

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### WARREN D. THACKER

called as a witness on behalf of the defendant, being first duly sworn, testified as follows on direct examination: My full name is Warren D. Thacker. I reside at Box 687, Route 1, Port Blakely, Bainbridge Island. I was employed by the Webster-Brinkley Co. from January 1, 1945, until October of that year. I was employed by the Works Manager for the initial purpose of organizing the paper work and the procedure of the Inspection Department. I had done somewhat similar work for a shipping organization in California and for Standard Brands of California. The first thing I had to do in connection with the job in order to write a procedure or go about a thorough and complete reorganization of the department which included all the paper work, was to find out how it was handled, where the reports went, what people were involved in the department and what each of those people did. I not only had to determine what they should do but actually what they did in the line of

their duty. As a result of that investigation, I prepared a manual for the department. It was written up as the investigation proceeded. Changes were made in it as I went along. When I went into the Inspection Department, it was with the idea that Mr. Fogman and I would work together on the manual and build it up as we continued our investigation. Mr. Fogman's very frequent absences made it necessary for me to pursue this work with Mr. Belfield. He helped me in outlining the manual. Most of the provisions of the manual—in fact, I should say all the provisions of the manual—were discussed with Tom as the manual was written. This manual outlined the duties of the people, of the Chief Inspector, his assistant and all of the inspectors in the department.

The Court: “Did you discuss with him the salary or the effect of the Stabilization Unit's action concerning salary in classification of position?”

The Witness: “Not in the manual. I discussed it with him personally.”

I did not discuss it with him at or about the time the matter was being discussed between the company and the Stabilization Unit. I did in the normal course of our work. I should say it was about the first part of February, 1945. I did not mean to say that I discussed with him the effect of the Stabilization Committee's action. I discussed with him his salary. I was very closely in touch with Mr. Belfield and his work. For the first six weeks of my work in the Inspection Department, I was with him almost constantly. Tom went with

me to each of the inspectors, introduced me to them. I accompanied Tom about the plant for the purpose of investigating the duties of these people and for the purpose of investigation his duties as well. I had to know exactly what everyone was doing in the plant in order to come up with a sensible procedure. We had a small inspection office there. We were so close together that we actually used the same desk. My work and Tom's work were both done in the same desk. In the course of the preparation of the manual for the other workers, I prepared a statement of the duties of other workers as well. In fact, that was prepared at my home in the evening. Tom came home with me and we sat in front of the fireplace. I wrote it out on the typewriter and Tom and I discussed each paragraph of it as it was written. We worked several evenings on it together. I am sure that every part of that manual was discussed thoroughly with Tom. He was in agreement with me. Many of the things that were included as a part of his duties were suggested by Tom. They were his ideas of what he should be doing or of what he was doing and what should be included. I did have occasion to go out with Mr. Belfield on his inspection trips outside of the plant. I went with him two or three times. We went over to Cunningham Steel. As to the procedure in the department so far as original inspections and approvals were concerned, inspectors were stationed throughout the plant at strategic spots where inspection work might be required. Each of these inspectors was given a supply of forms which he

filled out as he inspected the various lots of parts. The inspection, itself, would break itself down into perhaps three classes of inspections. There were those parts that were outright rejects, those parts that were complete acceptances and then there were borderline cases. In the case of outright rejection where a part obviously could not be worked to dimension or it was not to dimension, the inspector was entitled to put a rejection tag on it rejecting that material. If it was obviously within the limits, that inspector was entitled to accept it. If it was a borderline case, he had to use his judgment. If it was beyond his judgment, he could and did call either Tom or Mr. Fogman for a final decision on the things so far as they could decide. If it was beyond their discretion, they sometimes called in other higher employees of the company—the Engineering Department. The original inspector made out the reports of the original inspection in his own handwriting and had them at his work place in the plant. When he handed in his conclusions on this inspection report—we called it the pencilled copy—he would turn that in to the inspection office at 4:00 o'clock in the afternoon. The following morning, the pencilled copy of that inspection report was checked by Mr. Belfield. Those that were approved were laid in one pile and those that were rejections were laid in another pile. The rejected reports would be very carefully read and checked by Tom and initialled by him and turned over to the girl for typing. The accepted reports went on to her and were typed by her without further

comment or signature or checking. As to rework orders, we had two kinds of rework orders. There was a rework order that might be handled by a leadman, for instance, in the assembly, or by an inspector, where obviously the part could be reworked and where there was no question in the inspector's mind about it and where the part was very badly needed. We didn't have time to go through the regular procedure. The other type of rework was determined by the mechanical engineer and was handled as a rejection. The decision was by the planning engineer as based on the inspector's recommendation. I can't recall just how the rework orders were signed.

Q. "Did Mr. Belfield have anything to do with the rework orders?"

A. "Yes, because they were a rejection and they had to be approved by the Inspection Department."

Q. "It is a question of what he did, not what had to be done."

A. "He did."

Q. "Did he actually approve of them?"

A. "Yes, that is what I mean to say."

Mr. Belfield's duties as I found them out to be were as follows: I would meet him there in the morning at 8:00 o'clock when I came in. Tom was almost always there. The first thing Tom would do would be to go through the pencilled copies of the reports. He also went through the formal copies—that is, the typewritten copies that were for general distribution—in Mr. Fogman's absence. But ordi-

narily, if Mr. Fogman was there, Tom went over the pencilled copies and then made a tour of the plant. We would drop into the Warehouse Department, go from there over to assembly, around through the machine shop, consult with the various inspectors. They very frequently had borderline inspection problems that they didn't feel competent to decide which were left up to Belfield's judgment or to Fogman's judgment, if he could be reached. Mr. Fogman was absent very much of the time. He was almost always late from 1 to 3 hours. He was away for two or three days at a time when he simply wouldn't show up for work. The work accumulated. It had to be handled and was handled by his assistant. His assistant was required for that purpose to step in. The acting chief of the department during Mr. Fogman's absence was Mr. Belfield. The reports were signed by Mr. Belfield if Mr. Fogman was not in. After the tour of inspection, we would return to the office ordinarily. Tom was subject to call throughout the plant. You couldn't make a regular routine out of your calls throughout the plant. An inspector might call in and ask for Tom and ask for him to come and determine what was to be done—a borderline rejection. The inspectors from outside, Wallaston and Burdge, called in regularly. They were outside, away from the plant, and were required to use a little better judgment and a little more independent judgment than the inside inspectors, but still they would ask where they should go on their next call occasionally and inquire as to what should be done.

Q. "Were those calls directed at all to Mr. Belfield?"

A. "I would say that they were mostly directed to Mr. Belfield. It was almost useless for an outside inspector to call in for Mr. Fogman because of his very frequent absences. I would say most of them were directed to Mr. Belfield. As to the number in the Inspection Department at that time, there were a varying number, I should say 10 or 12 people."

Q. "Who supervised their work?"

A. "Mr. Belfield directly supervised their work. The type of work Mr. Fogman as head of the department did was slightly—it was with final decisions, with consultations with the Engineering Department, and such things. The direct supervision of the people was through Mr. Belfield. He was the supervisor."

Q. "In your trips around with Mr. Belfield, did you ever see Mr. Belfield make an original inspection?"

A. "No, I did not."

Q. "When you went around to make an inspection, what was the purpose and object of the visit and what did he actually do?"

A. "Well, he was almost—we were either making the rounds of the Inspection Department employees or he was called out directly by an inspector because of some indecision on the inspector's part."

Very often he would recheck the work of an inspector or he might tell the inspector to go ahead and write up a reject on this or he might say,

"This is all right," inspect it, and the inspector would write up his report. I was the representative of the works management, Mr. McCarthy. I was assigned there for the purpose of supervising the work. I was employed by Mr. McCarthy. I was paid by the company. He was the Works Manager of the Webster-Brinkley Co. He was not the working manager employed by a governmental agency. So far as Mr. Belfield's duties were concerned, my job was to investigate them very thoroughly, first to determine what they were, and then to realign them as much as possible in order to increase the efficiency of the department. As to whether I was in a position to say whether or not Mr. Belfield kept any record of overtime, as I have said, we were very intimate so far as our relationship in the office was concerned. We used the same desk. We were together very constantly, particularly during the first part of my work in the Inspection Department. During that time, I did not see any record of time kept by Mr. Belfield. I recall that Mr. Belfield told me some time—I had been there about a month—when he told me he was making within \$25.00 of as much as the Chief Inspector and that he was doing all of the work because of the Chief Inspector's absence; there was also, if I may use the expression, the normal beefing of employees during wartime, especially when long overtime hours were in order. I did as much of it, I suppose, as Tom did. That was the nature of our discussion. He did not express any dissatisfaction with the salary that was being paid. As to the connection



between the hours of work which were being worked by a leadman in the assembly department or one of the original inspectors, there would have to be an inspector on duty if there were work being done in the assembly department. Those parts had to be inspected as progress was made. As long as an inspection was being made, there had to be an inspector there. I wouldn't say there was any definite relationship between the time spent by Mr. Belfield in his department and the time spent by one of the original inspectors. We had two shifts operating there. Mr. Belfield ordinarily worked one shift of it. He was not there all of the time that inspectors were on duty by any means, wasn't required to be, couldn't possibly be. As to my recollection of any time during this period when Mr. Belfield was absent, I recall one time when he was late, came in about 10:00. I recall another time when he was off for a day. That happened in March, I believe. I recall Saturday afternoons twice when we left the plant together and spent the afternoon together. Aside from that, Tom was very regular in his reporting to work. As to the two Saturdays, I can recall that one of them was either the middle or the latter part of February. Fogman, Belfield, another chap and myself went down to a restaurant and had dinner and a general discussion which lasted the entire afternoon. As to any time when he was ill, there was one day he was ill. That I can definitely recall.

In cross-examination, Mr. Tracker testified as follows: I have never had the title of efficiency

expert. I was hired as a representative of the Works Manager to reorganize the work of the Inspection Department. My employment was based on the fact that I had had experience in doing similar work and that reorganization was required in the Inspection Department. I wanted to get greater efficiency there, to get a better alignment of responsibilities and duties of the various inspectors and an improvement in the flow of paper work necessary to the operation of the plant. The manual was an inspection manual. When I came there, I was to make up a manual of the inspection work and when I went in there I talked to everyone who would listen to me to find out from the inspectors, Belfield, Fogman and everyone, general information, and from that general information I sat down to make a manual and I worked at that from the time that I came there on or around January 1, 1945, to about April of that year, a period of about four months in the Inspection Department. Mr. Belfield had been Assistant Chief Inspector prior to the time I came there and was after I left. Twice Tom and I, rather than working at the plant, Tom came to my house. We had dinner together at my house. We worked at my house that night. Several times we worked at the plant.

Q. "Mr. Thacker, these pencilled reports that came in in pencil were handed in each day. The following day Mr. Belfield sorted the OK's from the rejections and looked at the blanks to see if they were all filled and turned them over for writing, isn't that right?"

A. "No, that is not right."

Q. "Do you claim that Mr. Belfield took the rejected reports, went out into the shop, miked those same jobs again to see if they were right or wrong, before he did anything?"

A. "That might occasionally happen, but very rarely. The normal course of things was for Tom to check the reports, approve them as to being correct or not correct. On these reports in many cases, the actual dimensions themselves that were at fault, were mentioned. Tom's duty, there, was to determine that the inspector was right in rejecting."

Q. "He had to rely upon that written report and the integrity of the inspector?"

A. "Yes, except in cases where the difference might be very slight, Tom might, if the part were very badly required, go out and reinspect it himself."

I said that Mr. Belfield never made an original inspection at any time while I was with him. It is not a fact that when I made these rounds in the morning he went around to see where they were behind and he was most needed and started in and did the same inspection work that the original inspectors were doing on gears and winches. I was not out with him every hour of the day, but every hour of the day I was with him he did not make an original inspection. I was with him in the office. As to when I went back to my office, I would say that varied very, very widely. I would say there

were occasional days when I spent the whole day with Tom and we even had lunch together. There were other days when I spent one, two, three or sometimes five hours. I want to say that when I was walking around with him, he wasn't doing inspecting. If he went back into the office after it was 5:00 o'clock in the evening or after that time, I don't know what he did, and when he went on an outside job I don't know what he did there, except when I accompanied him. I don't pretend to say to the court how many hours he worked at inspection work other than those when I accompanied him.

On redirect examination, Mr. Thacker testified: In my investigation of the work being done by him, I did discuss with him the amount of original inspection work that he actually did. Those points naturally came up because it had to be determined who was to do what work in the department. Tom had a dislike for paper work. He didn't like to do that kind of work. He liked to be out circulating in the plant. Tom never at any time when I saw him or was with him ever went to any inspection spot in the plant and stationed himself there for the purpose of inspecting parts that had not already been inspected by some other inspector and were not in doubt. He never reported to me that he was spending a large part of his time in original inspections. I do know personally of conferences in which he participated. I know of conferences of Fogman and Shadix and Tom in the inspection office. I sat in on some of them. I know of the fact that he had conferences among the inspectors pri-

marily, that is, he might meet with one or two inspectors regarding some particular part that was a borderline case. Someone had to decide those points and it was Mr. Belfield's duty to determine—either the fact that they were usable or that they must be passed on to someone of greater authority to determine whether they could be used or not.

On recross-examination, Mr. Thacker testified: Those conferences were never called by me. I had no authority to call such a conference. I do not mean to say that in such a conference all of the heads of the departments were called in with Belfield and discussed the situation. I mean by original inspection the first inspection made of the part.

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### GERALD S. McCARTHY

called as a witness by the defendant, being first duly sworn, testified as follows on direct examination:

My full name is Gerald S. McCarthy. I reside on Mercer Island, Washington. I was the Works Manager of the Webster-Brinkley Co. Mr. Belfield reported to me through the Chief Inspector. I did not hire Mr. Belfield originally, but I approved his appointment as Assistant Chief Inspector upon the recommendation of Mr. Fogman. I did talk to Mr. Belfield about the salary arrangement. At the time that the Inspection Department was reorganized, Mr. Fogman presented to me an outline of the functions of the Inspection Department and of the

personnel to fulfill these functions. I made an analysis of the Chief Inspector's job and the Assistant Chief Inspector's job in relation to other jobs in our plant and determined that the salary for both jobs should be fixed at certain figures, in the case of Mr. Belfield, \$425.00 a month. I then discussed with Mr. Washington, who handled our applications and the filing of the applications with the various governmental agencies, whether such a salary could be paid. I then talked both to Mr. Belfield and Mr. Fogman and informed them of what their salaries would be, informed them that such salaries could not be paid until formal application had been made and approval had been received, if such approval were ever received. No complaint was made on the part of either. The hours of work were explained as the hours that the plant operations normally worked and that the other executive and administrative personnel worked, which, at that time, was 6 days a week.

The Court: "Did you say that you told Mr. Belfield that the salary which you had approved at \$425.00 could not be paid until the Salary Stabilization Committee approved it?"

The Witness: "Yes."

The Court: "Did he make any objection?"

The Witness: "No. He wanted to know how long that would be. I told him that was one thing I could not answer, that we would make application as soon as possible."

Later, I would say at least once every two weeks,

he spoke to me with reference to the application and the progress thereon.

The Court: "What would he say, if you recall—any one of those every-two-weeks statements?"

The Witness: "Well, he would ask me whether we had heard anything yet or when he was going to be on his salary."

The Court: "Every two weeks or so. How many times do you recall?"

The Witness: "Oh, at least a half a dozen."

I told him that I would check with Mr. Washington and see if there was anything new. I never informed him as to any response of the Stabilization Committee until such response came through. The response came through and he was granted the change. I don't know exactly when the response came through, but he was granted the change on the 15th of November. I would say the original arrangement was made with him the early part of September. It took about that long for Fogman to come up with an organization chart and submit the form and the recommendations to me. When the response came through, I informed Mr. Belfield that approval had been granted to pay him the salary which we had requested. As to the kind of work he should do or what was said on that point as to the Stabilization Committee's action, I said only that he had been approved for the Assistant Chief—that the Salary Stabilization Unit had approved his salary for the Assistant Chief Inspector's job.

The Court: "Did the Stabilization Committee

have anything to do with approving or disapproving the kind of work that Mr. Belfield did?"

The Witness: "The application, I believe, outlined the type of work which was covered by the Assistant Chief Inspector's job and hence that is what they ruled on."

As to the function of Mr. Belfield in the Inspection Department, I heard the testimony of Mr. Thacker. I would say that that testimony was correct. I held the Chief Inspector responsible for the entire activities of the department and in the absence of the Chief Inspector, I held the Assistant Chief Inspector entirely responsible for the activities of the men and the work performed. I never attempted to operate that department myself or go over Mr. Belfield's head in dealing with the inspectors in the department. There was only one case that can be called to mind, and that is the case in which the entire management from Mr. Bannon down through the General Manager, the Chief Engineer and myself, together with the Chief Inspector and the Assistant Chief Inspector and one inspector on the winch line gave definite orders to the inspectors on the winch line which were not completely handled through the normal channels of authority. In other words, a man in the winch line was given definite orders with the knowledge of his superiors of what those orders were. I certainly couldn't have handled the routine affairs of any of the inspectors or all of the inspectors. I am 30 years old. I got started pretty early. I was 27 when I was made Works manager. As to previous



experience, I am a mechanical engineer and have a Master's degree in industrial engineering. I worked for the Fisher Body Company in Detroit as an engineer. I have worked for the Webster-Brinkley Co. since February, 1941. I started as project engineer. I was promoted to administrative engineer and then Production Manager and then Works Manager. I came to Tacoma first and worked at Tacoma for a plumbing supply company. I then moved to Boeing because they were in the type of work which I wanted to be in and which I had always studied. The Inspection Department reported to me together with other departments. I was held responsible for quality and performance and the Inspection Department as such was responsible to me for quality and performance.

The Court: "Did you ever go among the inspectors and observe what they were doing?"

The Witness: "Yes, I observed the operations throughout the entire plant."

The Court: "How often did you have occasion to observe what the various inspectors were doing?"

The Witness: "I would say I made a trip through the plant probably both morning and afternoon every day when possible, which was pretty generally."

I was aware of the trips made by Mr. Belfield to the outside plants. As to the purpose of those trips, particularly during the days of the winch contract, we had a great many parts which went from one subcontractor to another until they came into our plant and were completed. Castings would go from

a foundry to a machine shop and then to a machining plant and then for gear cutting. Mr. Belfield would have occasion to inspect parts which were doubtful after coming from a subcontractor's plant. There was no reason to bring them into our plant when a man could go out to another plant and examine. In some instances, he made trips to Western Gear Works to establish standards which were acceptable to our Inspection Department and to our assembly line with Western Gear Works. Those parts were also inspected by government inspectors. Differences of opinion arose between the government inspectors and our inspectors as to the usability of parts. When such differences of opinion arose, the doubtful parts were discussed. Generally in the case of one type of flaw or another—I say flaw, rather than tolerances—everyone has talked tolerances. There were three other things which took a man who had had wide experience in the machinery business for a good many years, such as welding, casting trouble. Those were matters of judgment much more than tolerances are. Tolerances are obvious to a measurement, but another thing was a matter of judgment. It was necessary to discuss between either Belfield or Fogman with the Maritime or Navy inspectors as to what we thought we could do to save such a piece if our Inspection Department thought it was justifiable to save it—that it was a good piece and could finally be repaired. As to whom we looked for the answer to that question, Fogman or Belfield, it depended upon circumstances. We had numerous

conferences at which the top executives and Mr. Belfield and Mr. Fogman—either one or the other or both—were present in connection with the winch contract because of some disagreements or difference of opinion with the Maritime Commission inspectors as to certain standards which made the winches acceptable. These conferences were called at various times to determine the exact standards which our company felt were acceptable winches. I don't remember the exact number of conferences. They were for the purpose of setting the standards through which our Inspection Department was then to carry out as the standard. Inasmuch as this spread throughout the various parts of the plant and into the plants of our subcontractors, it was necessary that the heads of the departments be thoroughly familiar with the standards. The Works Inspections Manager was under me. I know the authority which Mr. Fogman as head of the department and Mr. Belfield as his assistant had. As to their authority with reference to hiring and firing of employees, Mr. Fogman had the right to hire and fire any employee in the Inspection Department. In most cases, most department heads, before they would hire or fire—particularly in the case of firing, would generally check with their superior to see whether there was another place in the organization where that person might be used—something of that nature. But Mr. Fogman's recommendations would certainly be adhered to. As to the authority of Mr. Belfield in that regard, I would say that he was not allowed to hire or fire, but that

his recommendations were to be acted upon. Mr. Fogman was very irregular in attendance. I have no records to substantiate that, but he was very irregular. There were two forms of his absences, one, late arrival, and the other, complete absence from duty due to his health, according to his statements. It was his statement that his health was poor. I definitely know that he was absent. During his absence, Mr. Belfield was held responsible for the activities of the department. Mr. Belfield's testimony that in his absence I was the head of the department is not correct. I could not possibly have supervised the other activities in the plant, supervised the men, made the decisions that were necessary and allocated the men to their duties in the day to day operation of that department. Mr. Belfield did that work. As to the assignment of the work to the inspectors in the Inspection Department, when Mr. Fogman was there, in general he took over the allocation of the work in the machine shop. Mr. Belfield took care of the allocations in the assembly departments and on the outside. In Mr. Fogman's absence, Mr. Belfield took care of all of the assignments. It was quite often necessary for Mr. Belfield or Mr. Fogman to reinspect parts for any one of a number of causes. The purpose of that would be to determine the final satisfactoriness based upon their knowledge and judgment or to refer the case, if it seemed questionable to them, perhaps to the Engineering Department or perhaps to me for final decision. As to whether I know of my own knowledge of any original inspection having

been made by Mr. Belfield during this period of time when he was Assistant Chief Inspector, I distinctly remember in the case of the winch contract—when I suppose you can describe it as original inspection—when following some of these conferences a number of us, including Mr. Fogman and Mr. Forsythe, went out and inspected gears for the first time in measuring them for dimensions particularly but for their physical structure and that would be the first time they were looked at. I can at various times remember Mr. Fogman doing that and others—Mr. Fogman, myself and others. I would say that that was ordinarily referred to as an original inspection. It was not the complete inspection of the part but it was part of the original inspection. As to whether Mr. Fogman or Mr. Belfield did that, on many occasions, that was not a part of the routine of their jobs. As to the number of contacts I had with Mr. Belfield in his work there as Assistant Chief in the Inspection Department, that occurred at least several times a day personally, and anywhere from three to four times a day by telephone or intercommunicating system. The personal contacts during the day would vary in time, depending upon the circumstances and the situation. That close contact continued during the whole time of his employment as Assistant Chief Inspector. When I saw him, sometimes I would see him in the office, sometimes in the plant, and sometimes in my office. Those contacts gave me a chance to see what he was doing in connection with his job and afforded me a basis of judging

how he was occupied. As to an estimate of the amount of time he spent in original inspection work such as the other inspectors were doing, it was very little. In my opinion I would say it was not over 5%.

On cross-examination, Mr. McCarthy testified: I was employed at Boeing before I went to the Webster-Brinkley plant, for three months. Before that time, I worked in Tacoma for a firm there. At Boeing I was in the tooling department. I graduated from the University in 1937. Prior to becoming Works Manager, I had had experience in that type of work at the Webster-Brinkley Co. and in Detroit. I had never supervised that many people before. I reorganized the Inspection Department or requested its reorganization in August. I requested it first of the management, stating that the present organization was not satisfactory, that I had another man lined up for the Chief Inspector's job and that I wished to put him on the job. That was Mr. Fogman. Some considerable time later, I hired Mr. Thacker. The reorganization was begun around August. I hired Mr. Thacker in January. As to his duties, both Mr. Belfield and Mr. Fogman were shop men and I wanted a man on the job who was better on the organizational side. In August when the department was reorganized, I was the Works Manager. As Works Manager, the Production Department reported to me. The shop and Assembly departments reported to a plant superintendent who reported to me and the Warehouse

Department, through the head, a warehouse superintendent, and the Personnel Department, also reported to me. There were six people so reporting. I would say that under the various departmental heads that were under each of those, there were probably a total of from 350 to 500 people. I was responsible for the smooth running of that organization through those heads. That was my job. I spent my day on that type of work. As to the time I could devote to the Inspection Department at that particular time, it was an extremely important department and much more of my time was devoted to it than to other departments. There were several reasons for that. First of all, because of the critical nature of the jobs we were faced with, and also because the Chief Inspector was absent some of the time and I had to watch Tom to make sure he was getting everything lined up all right. I picked Mr. Fogman for Chief Inspector. Mr. Fogman recommended Mr. Belfield to help him. I knew about Mr. Belfield. I knew he was inspector in the department. I knew quite a bit about him. Mr. Fogman recommended him to me. I did testify this morning that I discussed a salary arrangement with Mr. Belfield. That was about the time that Mr. Fogman presented the outline of the organization of the department to me, I would say the latter part of August about. I talked to Mr. Belfield in my office. The exact phrasing would be a little hard to recall but as I remember it, he was told that the recommendation made by Mr. Fogman to appoint him as Assistant Chief Inspector had been

approved by me and by the Operating Committee—which was necessary, and that he would be placed on a salary basis instead of the hourly basis which he had been on. I think I told him we were giving him a promotion. I would say that pretty generally anyone who has been on an hourly basis definitely feels it is a promotion when it is changed to a salary.

Q. “Do you mean that a man who had an income of \$450.00 a month as wages and overtime and he is given \$425.00 in salary, he is promoted—because he has a title? Is that correct?”

A. “Well to my way of thinking it is.”

Q. “Well, Mr. McCarthy, to refresh your recollection, isn’t this a fact that you never discussed with Mr. Belfield any contract until after Mr. Belfield came to your office and told you that he was not making the money that he should be making and wanted to know what you were going to do about overtime on the salary he was then drawing, sometime about January, 1945? Is that correct or not?”

A. “No, I don’t remember that.”

Q. “Do you recall that he came to you a second time and he was angry and he told you that you were going to have to do something about his overtime and you told him to take it up with Fogman, did you do that?”

A. “No. I remember him being in anger several times but that was about other things.”



Q. "You never talked to him about overtime at all?"

A. "I don't believe so."

Q. "You know, Mr. McCarthy, whether he did or didn't, did he or did he not?"

A. "No, I don't think so."

As to whether he wrote out his resignation and sent it through to my office, I think he might have offered a resignation when he was trying to leave the company when Mr. Fogman was not there. As to why he was trying to leave the company, it would take quite a long time to explain. I think part of it was because—I think it has been earlier testified to on the stand, that he felt he was performing all the duties of the Chief Inspector and should have had the Chief Inspector's job and the Chief Inspector's salary, and the Chief Inspector was not there. I think that was one of his primary complaints. He never complained to me that he was putting in hours of overtime and was not paid for it. He complained that he was putting in hours of overtime but I don't remember him complaining about the overtime. He understood when he took the job that it was on a fixed salary.

Q. "You had that understanding with him?"

A. "I know I did."

Q. "You told him what his salary would be?"

A. "That is correct."

Q. "And he was happy to take it, was he?"

A. "Yes, I believe he was."

Q. "Did he say he was?"

A. "He didn't express himself as being unhappy."

As to whether he agreed to anything, he accepted the job and went to work on it. I talked with Mr. Belfield about his salary between August and November 15, 1944. I told the court this morning that he talked to me about it about every two weeks. As to why he talked to me about it, he wanted to know whether it was being approved or not. He wanted to know because he wanted to know if he was going to get a flat salary or not. As to whether he wanted to know if he was going to get less money that he was already getting, I don't remember that it was phrased in that way. I don't remember any discussion with Mr. Fogman about Mr. Belfield's complaining about any salary and overtime. As to whether Mr. Fogman told him that he would not have to work over 40 hours a week if he took this salary of \$425.00 a month, such a statement was never made to me. As to whether an executive had to get a permit to leave the plant, I think there were many people who were interdepartment heads or assistant department heads who had to get a permit to leave the plant. I don't believe that Mr. Fogman did. As to whether Mr. Belfield did when he was Assistant Chief Inspector, I don't know. I know as a regular outside inspector he did. As to who was in charge of the inspection when both Mr. Fogman and Mr. Belfield were not there, Mr. Belfield was there most of the time. I would say generally that he made no trips out of town unless it was so arranged that Mr. Fogman definitely

would be there. I can't remember that they were both gone at the same time. As to the time I was ever in the Inspection Department in one day, I have been in the Inspection Department or inspection areas of the plant with one of the production people, Fogman, Belfield, an engineer, as many as six hours on some days. As to what percentage of time in a month I was actually present in there, the Inspection Department was in several different areas in the plant. The office was in one place but there were areas where there was an inspection area and a warehouse area in addition. As to the percentage of time which I spent in the area of the inspection departments, I would say 25% or a little more. I know Mr. Wallaston. He was an outside inspector at the time. I believe he was at one time an inside inspector. He was an assembly inspector. As to his authority to sign the inspection sheets after they were typewritten, under the procedure, the first inspector did not sign the typewritten reports in general because he worked from a pencilled copy which he signed. Generally, because that was used in the working areas of the plant, it got dirty, naturally, from the work done with it so that was why the other copies were made from it. As to whether Mr. Wallaston ever signed the typewritten copies introduced as defendants' Exhibits A-9, A-10 or A-11, which are typewritten sheets made up from the pencilled copies, I don't know whether he signed them or not. I know he wasn't authorized to sign Belfield's name on it. As to whether Mr. Fogman may have signed it, he would not have

done it. He might have done it but it would have been against orders.

On redirect examination, Mr. McCarthy testified: I told him what the salary was that was being applied for. Mr. Belfield wasn't forced to take the job as Assistant Chief Inspector. He could have still remained as inspector so far as I was concerned.

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### GEORGE GREGSON

called as a witness for the defendant, being first duly sworn, testified as follows on direct examination: My name is George Gregson. I reside at 1316 N. 77th Street, Seattle. I am the General Manager of the Webster-Brinkley Co. and have been since the spring of 1944. I went with the Webster-Brinkley Co. in 1942 as Chief Expediter in charge of inside and outside expediting material from outside suppliers both in town and out of town. I then later became the Production Manager. From 1941 through 1945, the gross volume of work done by the Webster-Brinkley Co. was in excess of \$36,000,000 and comprised approximately 40 major contracts which varied from approximately \$150,000 to \$4,000,000. The Webster-Brinkley Co. manufactured at that time anchor windlasses, capstans, capstan windlasses, steering gears—both steam and steam hydraulic and electric hydraulic—and cargo winches. There were a number of other smaller items. Many of those items were being built for

the United States Navy and the Maritime Commission. The largest proportion of our business was done with them. We had one or two of the larger contracts with the Army. That work was directly connected with the war. It was all war work. It was equipment for both vessels in the Maritime service and vessels in the United States Navy. In my position as General Manager of the plant, Mr. McCarthy was my Works Manager. I had very definite opportunity to observe Mr. McCarthy's work as Works Manager. Mr. McCarthy is extremely efficient and has that almost unpurchasable asset of drive. He has the prime ability which many of those with whom he came in contact objected to as hot headedness but which actually got the material built. The work at that time was being done under the most extreme pressure. I would say that there was never a week—certainly never a week and often three or four times a day, that we were pressed from either one division of the Navy or the Maritime Commission, and at the time the Liberty ships were being built, the pressure was heavy. Later, when landing craft was the hottest program the United States Navy had, the pressure for steering gears for all of the large landing craft—and we built all of those—the pressure was tremendous. Later, the LST's—that is the landing ship tanks—on which we built all of the wildlasses, this pressure was terrific. Later came the corvettes with a steam steering gear. We designed the steam steering gear and I am told it is the only steam hydraulic steering gear built in the United States.

for the U. S. Navy. That program was under fire. At the time our Navy discovered that the Canadian Navy was able to convoy across the North Atlantic with corvettes, our Navy jumped to build 100 of those. We undertook the job, under extreme pressure through the Maritime Commission, to build the steering gears, and supplied them to the Navy. As to whether during that period of time the executive and administrative officers of the company worked more than the ordinary hours, they certainly did. I would like to say that the Webster-Brinkley Co. organization was an organization that grew. The expression that it "grew like Topsy" probably describes it. The vast majority of the executives, the administrative officers, the second in command, did put in an enormous amount of time. I was acquainted with the status on which the executive and administrative officers were hired so far as any given amount of time per week was concerned. I know the basis upon which Mr. Belfield—I personally knew the basis upon which Mr. Belfield was hired. I have this personal knowledge of the situation. The Webster-Brinkley Co. is operated under the direct supervision of the President of the company through an Operating Committee. The Works Manager was one member, the Treasurer of the company was a member, and the Vice President was a member. Only in cases where there might be a deadlock was it necessary for the President to serve. But all matters that pertained to the appointment of people to supervisory positions where it was necessary to clear through the Salary

Stabilization Unit, they came before the Operating Committee with recommendations from their superiors and with a back-up. I was familiar with the hiring of the executive and administrative officials of the company during that period of time. I was also familiar with those cases which were transfers—if they were transfers within the organization from one department to another, which gave a leadman a promotion or gave a stright machinist in the shop a promotion. Those matters all came before the Operating Committee. They were all cleared. As to whether any of the executive or administrative officers were ever hired for a definite number of hours per week. I am quite sure that they were not, certainly not to my knowledge. As to whether they were hired on all occasions to do a definite job irrespective of time, they were. They were hired to do a job. As to whether I know anything personally about the case of Mr. Belfield, I know considerable. I know of my own personal knowledge what the nature of his services was. I am certainly acquainted with the nature of his services. In the management of any organization, whether it be Webster-Brinkley Co. or a smaller or a larger organization or manufacturing business, there are two very vital spots—outside altogether of the actual operating end of the business. In other words, your machine shop must operate efficiently or as efficiently as it can operate. The two departments to which I have reference, Inspection and Cost Accounting, are two of the most important departments in the plant to management. I know what Mr.

Belfield's work was. He was responsible for the operation of the Inspection Department in the absence of his superior, Mr. Fogman. I have seen Mr. Belfield at his work. I spoke with him often. As to contacts with him, they were not often. On one particular occasion, I had a very close contact with him. It was in March, 1945. We were in trouble on this winch that has been mentioned. The Maritime Commission took the position that the standards being set by our Inspection Department were not high enough. It was a very serious matter. It could have been most critical and it almost came to that position, and on at least two occasions, Mr. Belfield was present at conferences in Mr. Bannan's office, conferences called at my suggestion, and Mr. Belfield and Mr. Fogman were both present. One was March 2 and one was March 5 of 1945. Mr. Belfield was there with Mr. Fogman to advise management and the President of the company as to the position Inspection took as against the charges made by the Maritime Commission inspection department. I recall very well when Mr. Belfield first made any claim for overtime. I don't remember the exact date. It was one day I was in Mr. Washington's office and the telephone operator found me there. Mr. Belfield called me by telephone and told me that he had decided he was going to institute suit against the Webster-Brinkley Co. I said, "I am very much surprised." That was considerably after he had left the Webster-Brinkley Co. He said he was employed at the Western Gear Works. That was the first knowledge that I had of



any claim by Mr. Belfield for any overtime against the Webster-Brinkley Co. He called me up himself. That was the first time that I had ever heard of any such thing.

On cross-examination, Mr. Gregson testified: As to whether we lost money on the winch contract, I do not know the exact answer. It was very, very close to a break-even contract. The Cost Accounting Department brought in figures to me, through Mr. Wiley, which showed that we were losing money on the first few ship sets on the winch contract and the loss was quite sharp and it was very upsetting, that is, the possible loss was quite sharp and upsetting. We proceeded to take steps to reduce that loss by going to the Maritime Commission. We did, on the basis of the work presented by our Accounting Department, achieve a negotiating adjustment to the contract. I think it still left the winch contract in a loss position. When, as General Manager, I found out that this was a losing venture, I had to do two things. I had to find out why the costs were in excess of the estimate. I set about to do that. As to whether we could do that by reorganization or reduction of salaries, we couldn't reduce salaries. We could not reduce men. As to whether we could designate a man as manager and say, "You are now an inspector or an officer and we are now going to give you a salary," that had nothing to do with the appointment of Belfield to his position. We couldn't do that. You couldn't do that because the position had to be established in order to bolster the Inspection Department and that was one of my

most severe headaches. That was one of the spots where I was after Mr. McCarthy continually. There is no question about the fact that we put Belfield in to assist Fogman because of the fact that Mr. McCarthy said, "Well, this will take care of this inspection trouble." As to whether, when the things won't pass inspection the trouble is in the manufacturing end, I would say not in this case. When the winch contract was on, our biggest headache was over supplies. It was material supplied by foundries and other outside plants that caused us our biggest headache.

On redirect examination, the witness testified: Mr. Belfield was not under any compulsion to take the job as Assistant Chief Inspector.

On recross-examination, the witness testified: As to whether I know as a matter of fact that Mr. Belfield attempted to transfer out of being Assistant Chief Inspector to an outside inspector and that the company refused to let him do that, I don't know. I certainly don't know that. I would like to say in direct reply that Belfield was considered a good enough workman that I am quite positive if Belfield had expressed a desire to remain an outside inspector, there never would have been pressure put on him. I am not just assuming that. I knew the organization quite well. I lived with it. I don't know whether Mr. Belfield ever protested his appointment to Mr. McCarthy. If he wanted to leave, I had no knowledge of it. I did not know

that he got a transfer through the Personnel Department to another company.

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### THOMAS R. BELFIELD

recalled as a witness on behalf of the plaintiff in rebuttal, testified on direct examination: I did not have any conversation with Mr. McCarthy in August or September, 1944, relative to going on a salary basis. I did not between the time that I was put in as Assistant Chief Inspector up until after I was on a salary talk to Mr. McCarthy about the salary. After I went on a salary, I think I talked to Mr. McCarthy about my salary, if I remember. The first time he referred me back to Mr. Fogman.

Q. "Did you discuss that you had overtime coming?"

A. "Yes."

The Court: "With whom was that?"

The Witness: "With Mr. Fogman, the Chief Inspector."

The Court: "I know—but whom did you inform that you had an overtime claim?"

The Witness: "I never said I had an overtime claim."

The Court: "Who were you talking to when you said anything about overtime?"

The Witness: "Mr. McCarthy."

I discussed the fact that I was working overtime—long hours. On both occasions, there wasn't very much said. The first time I seen him about

it, he referred me back to Mr. Fogman which in most cases he done. That was shortly after I went on a salary along about the first of the year some time. As to the second time and what was said, we both got a little mad, I think, but he still referred me back to Mr. Fogman.

The Court: "It is too bad you can't answer the question. It would save a great deal of time."

Q. (By Mr. Stewart): "Mr. Belfield, the Court wants to know if you discussed overtime with Mr. McCarthy."

A. "Yes."

Q. "What did you say to him?"

A. "Well, I told him that I was putting in quite a bit of overtime—I didn't like it, I told him. He referred me back to see Mr. Fogman about it."

Q. "About the overtime?"

A. "That is right."

I attempted to get out of the department. I sent him a written resignation from the Webster-Brinkley Co. through the interoffice mail. It was sent back by Mr. Fogman. It was rejected. Mr. Fogman was present in the course of the day's work, as they came and went, I would say 80%. There would be days that he wouldn't come in until 9:00 o'clock or 10:00 o'clock and then there would be other days that——

The Court: "Did you, yourself, know of any reason for that from your observation of him?"

The Witness: "Outside of being lazy or not

able to get up or something like that. He never was actually sick or anything that I could see.”

Plaintiff's Exhibit 6 is the inspection report. It was made up in the inspection office and typed by the girl. I examined that particular exhibit and find various pages in it carrying initials of “TB.” The initials “TB” are my initials on the first page.

Q. “Will you turn to those and state whether or not there are initials on there, ‘TB’ that are not your writing.”

The Court: “Do you mean those where there is a tab marking the place in the file?”

Mr. Stewart: “Yes.”

Q. (By Mr. Stewart): “Where there are tabs and where it is rejected and whether there are figures there and whether they are yours.”

A. “Here is a part rejected by the shop and signed ‘Rejection’ and initialled ‘TB’ and it isn't mine.”

That is not my signature. It is dated 12/27/44. As to another one, here it is another rejected report coming from the shop. It is signed “Argetsinger” and initialled by someone other than myself with a “TB.”

Q. “You may examine all of them and tell us of any in the book that are not yours, if there are more.”

The Court: “There are several places marked with tabs.”

Q. (By Mr. Stewart): “Look at those and count them.”

A. "Most of them are initialled off by the girl here."

Q. "No, just the ones that are 'TB', Mr. Belfield, whether it is your signature or whether it isn't."

A. "Yes, here is a rejection that is mine."

It is dated 1/3/45. Here is one by Mr. Fogman.

The Court: "Does it bear the initials 'TB'?"

The Witness: "No."

The Court: "Then you are not interested in it."

Here is another inspection report, 12/27/44. It is "Prindiville" and is initialled by "TB." That isn't mine. Here is another one, "Argetsinger," rejected 12/27/44 and initialled "TB." That is not mine. Here is one that is made out by Mr. Burdge, 12/30/44. That is initialled by me and is my signature. Here is another one made out by Prindiville, 12/27/44,2 initialled 'TB.' That isn't mine. Here is another one that is made out by Mr. Bayless, 12/28/44. That is initialled "TB" and is not mine. Here is another one that is made out by Mr. Burdge and initialled "TB." That isn't mine, dated 12/27/44.

The Court: "Do you think all of them that you have mentioned there are in 1944 as having the initial 'TB' except one which I think you admitted was yours?"

The Witness: "Yes, this was from 1/4/45 back to 12/28/44."

(Plaintiff's Exhibit 6 was admitted in evidence.)

I examined the other cases in the court room. I found others which were initialled with my initials.

On cross-examination, the witness testified: As to whether I was outside when those were initialled, I could have been in Portland or any place. As to one on 12/28/44 and one 1/3/45, they are my initials. I don't know who signed them. I did not authorize anybody to sign my initials. As to whether anybody was authorized to sign the approvals on those reports except me and Mr. Fogman, I don't know. I don't know what Mr. Fogman had issued in the way of orders to that effect. I looked through that list.

Q. "Did you find any report during that period where the approval was signed by anybody except you and Mr. Fogman?"      A. "Yes."

Q. "Come right down and pick that out."

A. "Those were put on there as my initials but I have never signed that."

Q. "All right, then I will correct it. You didn't find any that were not signed by the initials of 'TB' for you or by Mr. Fogman?"

A. "There are some in there that are not even signed by anybody."

Q. "How about rejections?"

A. "On rejections."

Q. "Well, there are not very many of them that are not signed, are there?"

A. "I wouldn't know. I never went through but just a few."

When I talked to Mr. McCarthy about overtime, all I did was to complain of the general overtime. I was working long hours each day. I didn't demand of him any payment for overtime but I wanted back off a monthly salary at one time.

Defendant's Exhibit A-8 and A-9 admitted into evidence. Plaintiff's Exhibit 3 admitted in evidence. After argument, the Court announced the following decision:

"In my opinion it is a question of fact in respect to each of these two plaintiffs, as to whether or not they occupied an executive, administrative, or some other capacity that is exempt from the Act or were wage earners who were covered by the Act and protected by its provisions.

"The Court has listened with a great deal of interest and has carefully considered all of the evidence adduced, in this case, touching the activities of both plaintiffs.

"As to the Plaintiff Belfield, I have considered all that has been testified to and all that has been said by counsel on both sides. It seems to me, and the Court finds, concludes and decides that Mr. Belfield, while occupying a nominal rank in advance of the other inspectors, did nothing, in reality, different from what they did except to sign some inspection reports or to permit his initials to be attached or affixed to certain inspection reports. Insofar as that was done, in this instance, it was a mere clerical performance.

"Mr. Belfield did not impress the Court that he



had the quality of mind or of ability that calls for great discretion in that process connected with the signing or initialling of his name on those reports. Those reports seemed to the Court, as disclosed by the evidence, to have been in themselves something of routine which was done pursuant to established procedure. They were done, in a large percentage of the instances mentioned in the evidence, as a matter of routine by some clerical employee or typist, who had affixed the initials of Mr. Belfield. I believe, of those that were specifically mentioned and introduced in evidence, there was only one where the initials of Mr. Belfield were affixed by Mr. Belfield's own hand.

“There were a number of instances, as disclosed by the evidence, when Mr. Fogman, who was, in fact, the head of the Division of Inspection, was absent from his post for some hours of the day or for the whole of the day or days. The inquiry naturally arises, as to who may have been performing his duties of supervision during those absences. But the Court is not convinced that the situation was anything other than one of suspended supervision until he got back. From all that the Court is able to glean from the testimony, as to what Mr. Belfield actually did is concerned, I carefully observed Mr. Belfield's demeanor on the stand, his manner of testifying, and all of the other measuring sticks by which triers of the fact may properly determine the credibility of a witness, and I would never be impressed that Mr. Belfield is a

man of such a nature or disposition—even if he had sufficient ability, in fact—to be put in a position of discretion and important supervision. I just can't be convinced by the evidence, in this case, that, as a matter of fact—he was in such a position in this case.

“It is, therefore, the opinion, finding, conclusion and decision of this Court that the plaintiff Belfield was not, in respect to his employment, anything other than a wage earner, and that he was no different, in the capacity of his actual service, from the other inspectors, and that—although he carried the nominal position of Assistant Chief—the character of his services was like that of other inspectors, rather than like that of Mr. Fogman, who was, in reality, the Chief.

“I also find that as to him, since the Act does apply, that he was entitled to overtime for all hours worked during any one week in excess of forty hours, and that the rate of pay was one and a half times the regular hourly scale. Of course, the result will be obtained by ascertaining the total number of hours worked in one week and deducting therefrom forty hours, and then, on that difference, multiplying by one and a half times the regular hourly scale. If he was paid anything in excess of forty hours regular scalepay, then he will have to acknowledge credit for payment for any of the hours over forty, to the extent that he was paid in excess of forty.”

[Endorsed]: No. 11680. United States Circuit Court of Appeals for the Ninth Circuit. Webster-Brinkley Company, a corporation, Appellant, vs. Thomas R. Belfield, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed July 7, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

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In the Circuit Court of Appeals of the United States  
for the Ninth Circuit.

No. 11680

THOMAS R. BELFIELD,

Appellee,

v.

WEBSTER-BRINKLEY, CO.,

a corporation,

Appellant.

STATEMENT OF POINTS UPON WHICH  
APPELLANT RELIES AND DESIGNA-  
TION OF PORTION OF THE RECORD  
NECESSARY FOR CONSIDERATION  
THEREOF

Appellant, Webster-Brinkley Co., relies on this appeal upon the following points, to-wit:

1. The evidence was insufficient to justify the

court in concluding that Thomas R. Belfield was not employed and worked for the Webster-Brinkley Co. in an executive or administrative capacity and was not exempt from the Federal Fair Labor Standards Act but was subject to said act and entitled to overtime under it.

2. The evidence was also insufficient to justify the court in finding that Thomas R. Belfield was employed at \$425.00 a month upon the basis of forty hours of work per week and it was insufficient to justify any finding by the court that the basis of employment was other than \$425.00 a month for such number of hours per week as the job might take or as he might work; in other words, that the employment was for no definite but for a fluctuating number of hours per week.

3. The evidence was also insufficient to justify the court in finding that Thomas R. Belfield actually worked 591 overtime hours or any number of overtime hours.

4. The evidence was insufficient to justify the court in adopting the formula it adopted to calculate the overtime due Thomas R. Belfield, if any, and the award to Thomas R. Belfield of the sum of \$2174.88.

5. The evidence was also insufficient to justify the court in allowing to Thomas R. Belfield an additional equal amount of \$2174.88 as liquidated damages.

6. The court erred in making and entering its findings of fact No. III and IV, its conclusion of

law No. II and its judgment against the defendant in the sum of \$4349.76, together with attorneys' fees in the sum of \$500.00 and the costs of suit.

7. Since the decision of the lower court, there has been enacted into law the Portal-to-Portal Bill of 1947 approved May 14, 1947, which contains retroactive provisions applicable to this case. The appellant will call the court's attention to that statute and, in particular, Sections 9 and 11 thereof, and urge the court, if it should not reverse the decision of the lower court, to provide that on remand to the District Court, that court shall have authority to consider any matters presented to it under the Portal-to-Portal Act of 1947.

In fact, the entire record pertaining to the Belfield case and all the exhibits with reference to that case, have been forwarded to the Circuit Court of Appeals. The testimony has been reduced to narrative form. The appellant hereby designates the entire record which has been forwarded to this court, together with all the original exhibits forwarded to this court and the narrative statement of the oral testimony, as the record which the appellant thinks necessary for the consideration of the points on which it intends to rely on this appeal.

Dated this 2nd day of July, 1947.

CATLETT, HARTMAN,  
JARVIS & WILLIAMS,

/s/ FRED W. CATLETT,  
Attorneys for Webster-  
Brinkley Co., Appellant.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION AND ORDER  
ELIMINATING ORIGINAL EXHIBITS

It Is Hereby Stipulated by and between Thomas R. Belfield, appellee, and Webster-Brinkley Co., a corporation, appellant, by their respective counsel, that all exhibits admitted in evidence at the trial of the above entitled case and designated by stipulation to be transmitted to the above entitled court as part of the records of this cause herein be excluded from printing, and the court be and it is hereby requested to consider the same in their original forms as though set out in the printed record.

Dated at Seattle, Washington, May 19th, 1947.

CATLETT, HARTMAN,  
JARVIS & WILLIAMS,  
/s/ FRED W. CATLETT,  
Attorney for Appellant.

/s/ LEO W. STEWART,  
/s/ CHARLES H. HEIGHTON,  
Attorneys for Appellee.

So Ordered.

/s/ FRANCIS A. GARRECHT,  
United States Circuit Judge.

[Endorsed]: Filed July 7, 1947.

IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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WEBSTER-BRINKLEY COMPANY, a corpo-  
ration,

*Appellant,*

vs.

THOMAS R. BELFIELD,

*Appellee.*

---

UPON APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE WESTERN DISTRICT  
OF WASHINGTON, NORTHERN DIVISION

---

**BRIEF OF APPELLANT**

---

CATLETT, HARTMAN, JARVIS & WILLIAMS  
*Attorneys for Appellant.*

1410 Hoge Building,  
Seattle 4, Washington.

OCT 13 1947





IN THE  
UNITED STATES  
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**IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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WEBSTER-BRINKLEY COMPANY, a corpo- ration,	vs.	<i>Appellant,</i>	}	No. 11689
THOMAS R. BELFIELD,		<i>Appellee.</i>		

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UPON APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE WESTERN DISTRICT  
OF WASHINGTON, NORTHERN DIVISION

---

**BRIEF OF APPELLANT**

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This is a suit for overtime under the Federal Fair Labor Standards Act, 52 St. 1069, 29 U.S.C. Sec. 216.

The complaint merely alleged that Thomas R. Belfield was employed by the defendant as Assistant Chief Inspector; that the defendant was engaged in making parts for the Maritime and Navy Services of the United States and for vessels constructed in connection with such Services; that the plaintiff was so employed from about November 20, 1944 to and including May 13, 1945, and that during said period he worked 591 hours overtime; that his pay per hour at the rate of time and a half would be \$3.68 per hour; that the defendant was indebted to him in the

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*(Figures in brackets refer to pages of the Transcript  
of Record)*

sum of \$2,174.88; that under Federal statutes he was entitled to double the amount of wages earned, or a total of \$4,349.76. Plaintiff also asked for a reasonable attorney's fee of \$1,500.00 (2-6).

The defendant, in its answer (8-11), admitted the employment and that it was manufacturing steering devices and parts for the Maritime Commission and United States Navy. It denied the other allegations of the complaint. By way of a separate and affirmative defense, it alleged that in August, 1944, Webster-Brinkley Company commenced the reorganization and enlargement of its Inspection Department and on October 9, 1944, it filed an application to establish the proper salary for positions of Chief Inspector and Assistant Inspector of its Inspection Department with the Salary Stabilization Unit of the Bureau of Internal Revenue, which, under presidential order governing administration of the wage stabilization regulations, had jurisdiction over salaried employees occupying executive, administrative or professional positions and receiving salaries of more than \$200.00 per month; that after investigation and in November, 1944, the Salary Stabilization Unit approved the application to fix the salary of the plaintiff, Thomas R. Belfield, in the position of Assistant Chief Inspector, at \$425.00 per month and that on November 16, 1944, plaintiff, Thomas R. Belfield, entered upon his employment as Assistant Chief Inspector at the salary fixed; that the position of Assistant Chief Inspector was a supervisory position and classifiable as an executive or administrative position under the regulations of the Administrator of the Wage and Hour Di-

vision of the Department of Labor issued pursuant to Section 13(a) of the Fair Labor Standards Act enacted June 25, 1938, 29 U.S. Code, Secs. 201 to 219, and that plaintiff was therefore exempt from Provisions 6 and 7 of said Act.

For a second affirmative defense, defendant alleged, in addition to the allegations of the first affirmative defense, that Thomas R. Belfield fully understood that in the position of Assistant Chief Inspector he was acting in an executive or administrative capacity and would not be entitled to overtime; that he was fully informed of the application to the Stabilization Unit and its action thereon, and that he accepted the employment with the understanding that he would not be paid for overtime, and that he received his check semi-monthly in payment for his services, at the rate set forth, during the whole period of his employment, and that during such period he never claimed he was entitled to any overtime or asserted that his position was a non-exempt position; that because of such facts the defendant kept no record of the hours worked by Mr. Belfield, as it did not of any of its other executive and administrative employees, and that Mr. Belfield was estopped to claim he occupied a non-exempt position or to claim any overtime in connection therewith.

The Findings of Fact (13) assert that the jurisdiction of the lower court depended upon Section 14(8), 28 U.S. Code, and that suit was brought to recover compensation pursuant to Section 16(b) of the United States Fair Labor Standards Act of 1938. It is believed the Findings are erroneous as to the

statute upon which the jurisdiction of the lower court depended. In our judgment it depended upon Judicial Code Sec. 128, as amended, 28 U.S.C. Sec. 225(a) First, and (d), Sec. 24 Judicial Code, as amended, 28 U.S.C. Sec. 41, and the Fair Labor Standards Act, 52 Statutes 1069, 29 U.S.C. Sec. 216.

### STATEMENT OF THE CASE

This is a suit by Thomas R. Belfield against the Webster-Brinkley Co., a corporation, for alleged overtime work performed between November 20, 1944, and May 13, 1945. It is admitted that plaintiff was employed as Assistant Chief Inspector of the Inspection Department of the company at a salary of \$425.00 a month without overtime, that he was during this twenty-five week period paid his salary regularly by check every two weeks, that he made no claim for any overtime during his employment and not until about eleven months after he quit work for the company. The plaintiff claimed, however, that under the provisions of Sec. 7 of the Federal Fair Labor Standards Act, he was entitled to overtime for all time worked in excess of 40 hours a week at the rate of one and a half times the regular hourly rate arrived at by multiplying the monthly salary by 12 and dividing that, first by 52, and then by 40, and that under Sec. 16(b) of the Act, the total thus arrived at *must* be doubled as liquidated damages. The plaintiff further claimed that between the dates mentioned he worked 591 hours of overtime. The defendant conceded that the plaintiff worked at times more than eight hours a day but claimed that he was employed



as Assistant Chief Inspector on a guaranteed monthly salary, that he was expected to and understood that he would be called upon to work at times more than eight hours a day without further compensation, that he was employed to do a job and on the same basis as were all the other executive and administrative employees of the defendant. The defendant maintained that the plaintiff's job was classified by it, and properly, as an *administrative* position and that it was as such exempt, under Sec. 13(a)(1) of the Act, from the provisions of Sec. 7 of the Fair Labor Standards Act. It further contended that the plaintiff was employed for a fluctuating work week, that the defendant did not know and had no way of ascertaining what hours of overtime (using that word in exactly as meaning more than eight hours a day) the plaintiff might have worked, but denied emphatically that he ever worked any such amount as 591 hours. On the evidence produced by the plaintiff, the defendant also contended that he had failed to prove the performance of any certain amount of overtime work, that even if he had, since there was no testimony as to the hours he worked in any particular week, it was impossible to ascertain his regular rate per hour. On the evidence also, it must be admitted that there is not a particle of evidence that the employment was for a 40-hour week.

On these issues, the court found in favor of the plaintiff in strict accordance with the allegations of his complaint and awarded him a judgment in the full amount claimed, doubled, and for \$500.00 in addition as attorney's fees (17). After a motion for a

new trial (18-20) which was argued and denied (23), the defendant appealed to this court (21).

### **SPECIFICATIONS OF ERROR**

The court erred in making its Findings of Fact No. III and No. IV and in entering its Conclusion of Law No. II, in the following respects (14-15) (The "Transcript of Record" is erroneous in that it omits Finding of Fact III and numbers Finding of Fact IV as III):

1. In finding that the plaintiff was not exempt from the provisions of Sec. 7 of the Federal Fair Labor Standards Act but was subject to the provisions of Sec. 7 and entitled to overtime under it (14).

2. In finding that Thomas R. Belfield was employed upon the basis of 40 hours of work per week and in not finding that the employment was for no specific number of hours per week but for a fluctuating number of hours (14).

3. In finding that Thomas R. Belfield actually worked 591 overtime hours or any specific number of overtime hours (14).

4. In adopting the formula it adopted to calculate the overtime due Thomas R. Belfield, if any, and in the award to Thomas R. Belfield of the sum of \$2,173.70.

5. In allowing to Thomas R. Belfield an additional equal amount of \$2,173.70 as liquidated damages (14-15).

6. Since the decision of the lower court, there has been enacted into law the Portal-to-Portal Bill of 1947

approved May 14, 1947. That Act contains retroactive provisions applicable to this case. Under that Act, it is no longer mandatory upon the trial court to double the amount of overtime allowed as liquidated damages, but if it appears that the employer was acting in good faith, the court in its discretion may decline to award liquidated damages. Appellant believes the good faith of the employer in this case is undeniable under the evidence, and that the lower court, if it had had any discretion at the time of pronouncing judgment, would not have awarded double damages and that if it had done so, would have erred, and that this court would have set aside such an award as an abuse of discretion.

The above specification of errors is based upon the claim of appellant that the evidence was insufficient to support any one and all of the foregoing findings and conclusions.

## **ARGUMENT**

### **I.**

The primary question in this case is one of classification of employment. Was Thomas R. Belfield employed in an executive or administrative position during the period in question? If he was, he was exempt from the provisions of Sec. 7 of the Federal Fair Labor Standards Act as to overtime. If not, he was entitled to payment for such overtime as he could prove. Sec. 13(a) of the Federal Fair Labor Standards Act reads:

“The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed

in a bona fide executive, administrative, professional \* \* \* capacity \* \* \* (as such terms are defined and delimited by regulations of the administrator)."

Under the authority of the latter provision, the Administrator has defined the terms "executive" and "administrative" as follows:

"EXECUTIVE.—The term 'employee employed in a bona fide executive \* \* \* capacity' in section 13(a) (1) of the Act shall mean any employee

(a) whose primary duty consists of the management of the establishment in which he is employed or of a customarily recognized department or subdivision thereof, and

(b) who customarily and regularly directs the work of other employees therein, and

(c) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight, and

(d) who customarily and regularly exercises discretionary powers, and

(e) who is compensated for his services on a salary basis at not less than \$30 per week (exclusive of board, lodging, or other facilities), and

(f) whose hours of work of the same nature as that performed by non-exempt employees do not exceed twenty per cent of the number of hours worked in the workweek by the non-exempt employees under his direction; provided that this subsection (f) shall not apply in the case of an employee who is in sole charge of an independent

establishment or a physically separated branch establishment.

“ADMINISTRATIVE.—The term ‘employee in a bona fide \* \* \* administrative \* \* \* capacity’ in section 13(a)(1) of the Act shall mean any employee

(a) who is compensated for his services on a salary or fee basis at a rate of not less than \$200 per month (exclusive of board, lodging, or other facilities), and

(b) (1) who regularly and directly assists an employee employed in a bona fide executive or administrative capacity (as such terms are defined in these regulations), where such assistance is non-manual in nature and requires the exercise of discretion and independent judgment; or

(2) who performs under only general supervision, responsible non-manual office or field work, directly related to management policies or general business operations, along specialized or technical lines requiring special training, experience, or knowledge, and which requires the exercise of discretion and independent judgment; or

(3) whose work involves the execution under only general supervision of special non-manual assignments and tasks directly related to management policies or general business operations involving the exercise of discretion and independent judgment; or

(4) who is engaged in transporting goods or passengers for hire and who performs, under only general supervision, responsible outside work of a specialized or technical nature requiring special training, experience, or knowledge, and whose duties require the exercise of discretion and independent judgment.

The burden of proof of establishing the exemption is upon the employer, but the burden of proof of establishing the overtime is upon the employee.

Before discussing the evidence in its application to the Administrator's definition, brief reference should perhaps be made to the salary and wage regulations in effect during the time covered in this case. The court will doubtless take judicial notice of such matters, but in fairness it should be pointed out that in October of 1942 Congress passed the wage stabilization law authorizing the President to issue a general order stabilizing wages and salaries and to promulgate such regulations as he considered necessary. Pursuant to that regulation, the President did issue executive order No. 9250, which was subsequently amended by executive order No. 9381 on September 25, 1943. It created an Office of Economic Stabilization and an Economic Stabilization Board with a director who served as chairman. Title II, Sec. 1 of the order provided that no increase in wage rates should be authorized unless notice was filed with the National War Labor Board and unless that Board had approved such increase. The National War Labor Board was authorized to designate the agency of the federal government to carry out the wage policies stated in the order. It did so, and among other things, provided: "Salaries and wages under this order shall include all forms of direct or indirect remuneration to an employee or officer for work or personal service performed for an employer or corporation, etc."

By executive order No. 9328 issued April 8, 1943, the President directed the National War Labor Board,

the Commissioner of Internal Revenue and other agencies to "authorize no further increase in wages or salaries except such as are clearly necessary to correct substandards of living, etc." This was the so-called "hold the line" order. Pursuant to the authority conferred upon him, the Economic Stabilization Director did issue extended regulations which may be found in 7 Fed. Reg. 8748. These regulations divided the authority to control wages from that controlling salaries. The jurisdiction of the National War Labor Board covered wage payments and covered salary payments not in excess of \$5,000 per annum where such employee in his relations with his employer was represented by a duly recognized labor organization or where he was not employed in a bona fide executive, administrative or professional capacity. The control of salaries was placed under the Commissioner of Internal Revenue and covered all salaries except those previously referred to. The Commissioner of Internal Revenue created in his department what was known as the Stabilization Unit to handle the control of salaries. The Stabilization Unit did not have jurisdiction over wages and did not have jurisdiction over salaries under \$5,000 if the employee was not employed in a bona fide executive, administrative or professional capacity. The National War Labor Board entrusted the administration of its portion of the wage stabilization program to the Wage, Hour and Public Contracts Division of the Department of Labor. This division had no jurisdiction over the salaries of executives or administrators.

This difference of jurisdiction is important in this

case. Mr. Belfield while an inspector was under the jurisdiction of the Wage, Hour and Public Contracts Division of the Department of Labor. When he was appointed Assistant Chief Inspector, he was classified by his employer as an executive or administrative employee. Consequently, his salary was fixed and controlled by the Stabilization Unit of the Bureau of Internal Revenue. In establishing any new position such as that of Assistant Chief Inspector, the Webster-Brinkley Co. was compelled to apply to the Stabilization Unit to fix a salary therefor and could not pay that salary until approval had been received. In addition, it could not change an hourly wage which was under the jurisdiction of the Wage, Hour and Public Contracts Division of the Department of Labor to a monthly salary which was under the jurisdiction of the Stabilization Unit of the Bureau of Internal Revenue until it had received the approval of the Stabilization Unit to the salary for the position. That is the reason why, in Mr. Belfield's case, he was told that the change to his salary rate could not take effect until approval had been secured from the Stabilization Unit and why, in the meantime, he had to be paid on his old hourly rate basis (72).

Pursuant to the power conferred upon him, the Commissioner of Internal Revenue on October 29, 1943, 7 Fed. Reg. 8820, issued his regulations governing salary administration. His definitions of "executive" and "administrative" followed those of the Administrator previously set forth. Sec. 1002.13 of those regulations provided that no increase in salary should be made by the employer except as provided in



Sec. 1002.14 without prior approval of such increase by the Commissioner, and later in the same section, subparagraph 4, it was provided:

“Payment for overtime will constitute an increase in salary rate and thus will require the approval of the Commissioner unless the customary practice of the employer has been to pay for overtime and the rate and scheduled number of overtime hours of work have not been changed.”

The Webster-Brinkley Co. was not paying any overtime to any of its administrative or executive personnel and had never done so. It could not, therefore, after the application and ruling of the Stabilization Unit in Mr. Belfield's case (def. Ex. A-9) have paid Mr. Belfield any overtime without violation of the regulations of the Commissioner.

Returning now to a consideration of the facts in this case and their application to the Administrator's definitions as previously set forth, the evidence is undisputed that Hal Fogman was Chief Inspector of the Inspection Department which was a recognized and established department of the Webster-Brinkley Co. It will hardly be denied that he clearly qualified as an executive under the Administrator's definition. He was Mr. Belfield's immediate superior.

Although Mr. Belfield's duties certainly included some, and perhaps all, the requirements for an “executive” position, it is believed that his job as a whole is more accurately classified as “administrative.” Indeed, it may be said with even greater accuracy that his job was at *least* an administrative job under the

definition of the Administrator. The requirements of that classification are (1) A salary of not less than \$200 a month (Mr. Belfield received \$425 a month); (2) Either one of four other requirements. For our purposes, let us take (b) (1), an employee "who regularly and directly assists an employee in a bona fide executive or administrative capacity where such assistance is nonmanual in nature and requires the exercise of discretion and independent judgment."

With these requirements in mind, what does the evidence show the facts to be concerning Mr. Belfield's employment? We emphasize the word "employment," because we believe the lower court went astray in endeavoring to classify the man instead of the job. The lower court said that in its judgment, Mr. Belfield did not have the "quality of mind or ability that calls for great discretion." That, however, is not the test fixed by the statute. During the war period, there were thousands of cases where men of perhaps insufficient training or capacity were occupying jobs for which they were not perfectly fitted. The question was not whether Mr. Belfield was *fitted* for an administrative job but whether the job was *administrative in character under the Administrator's definition*.

What does the evidence establish as to the character of this job? Admittedly, Mr. Belfield was Assistant Chief Inspector. The Webster-Brinkley Co. was engaged entirely in war work for the Navy and Maritime Commission. It manufactured steering gears, capstans, windlasses, and, during the period in question in this case, was largely engaged in the manufacture of cargo winches for ships. It built these

articles to government specifications and its product was subject to final and rigid government inspection. It was obviously vital to the very existence of the defendant that its own Inspection Department function efficiently and accurately.

The Webster-Brinkley Co. Inspection Department was a recognized department under and responsible to the Works Manager. It consisted of a Chief Inspector, Hal Fogman, an Assistant Chief Inspector, Tom Belfield, from 10 to 15 inspectors (34), and one or two clerical employees. It had a central separate office occupied by Fogman, Belfield and the clerical employees. The inspectors were posted by assignment to various stations or inspection areas in the plant. A very large proportion of the defendant's operation was assembling parts manufactured elsewhere into the complete product. To avoid loss through the transfer of unsuitable and defective parts, outside inspectors were placed in or visited these outside suppliers. The inspectors carried blueprints prepared by the engineering Department. The articles being built by Webster-Brinkley required great precision in construction and were being fabricated under the constant pressure of the war's demands. The inspectors had to be machinists and had to have the skill to read accurately the blueprints, interpret them, and apply them to the parts being produced. The inspector had to determine whether the part complied with the specifications and requirements of the blueprint in its measurements and was in every respect satisfactory in size and quality. "An assembly inspector," Mr. Belfield said, "watches these different machines being

assembled and sees that they are assembled right and work free" (33). It is difficult to see how anyone could conclude that the performance of such duties did not require constantly the exercise of discretion and judgment. If the exercise of discretion and judgment were the only requirement, every one of the inspectors could have been properly classified as administrative.

But admittedly, Mr. Belfield did more. He was Mr. Fogman's "right hand man." There is no doubt that Mr. Belfield regularly and directly assisted an employee in a bona fide executive capacity. He supervised or assisted in the supervision of from 14 to 16 persons (34). He assigned the stations or inspection areas to all of the inspectors in the *assembly* plant and, in the absence of his chief, Fogman, to all of the inspection areas in the *whole* plant (92). Fogman was absent a large part of the time through alleged sickness. Even Belfield said he was absent about 20% of the time (108). Defendant's Ex. A-10 shows 35 days out of 180 when Fogman approved no inspection reports; this would indicate he was absent for entire days 20% of the time. As all witnesses agreed he was frequently hours late in arriving at work, his total hours absent would greatly exceed 20%. During Fogman's absence, Belfield, as Assistant Chief, was the top man in the department. Undoubtedly, Belfield participated in some conferences of executives to thresh out difficulties in inspections and to establish standards (90). Admittedly, he did review and approve many of the first inspections (57). It is evident that throughout his testimony he played down the importance of his job. Judges dealing with this

type of case have frequently remarked that this is the common attitude of the plaintiff. In *Ashworth v. Badger*, 63 Fed. Supp. 710, for instance, Judge Ford of the District Court of Massachusetts said:

“In this case, there was a tendency on the plaintiff’s part to ‘talk down his job’ to avoid the exemption.”

But even the plaintiff, in the course of his testimony, disclosed important facts, and other testimony and undisputable documentary evidence show overwhelmingly that Mr. Belfield’s job did involve the constant exercise of judgment and discretion, and that it was nonmanual in its nature. To be sure, inspection does require the use of the hands in making measurements and in lifting and moving parts for purposes of examination, but the manual work, as has been so often said by the courts, is incidental to the main job; *Marion v. Lockheed Aircraft Corp.*, 65 Fed. Supp. 18. It is a necessary prerequisite to the exercise of the judgment and discretion, which is the important part of the work and the part which justifies the high salaries paid.

We have said that Mr. Belfield played down his job. It is worth while referring to his testimony in that respect. He testified that he did the same work as the inspectors under him (37), except for looking over the inspection reports which came into his office in the morning (39). When asked if it was “manual,” he said, “*Yes, it was inspecting tools*” (35). As to the reports, he said he had absolutely no independent discretionary authority as to them (35), that he merely separated the reports that were O.K. from the ones

that were rejected, and that the rejected ones eventually went to Fogman, the Chief Inspector (35); that "he had the final say-so on all of them"; that the sorting of the reports probably took a half an hour to one hour in the morning, and that then he went out into the plant and worked with the rest of the inspectors in the assembly line, in the shop and in the warehouse, that he spent 90% of his day in doing "the work of the other regular inspectors in the shop" (36), that there was no difference between the work he did as inspector prior to reorganization and what he did afterwards. "It was the same type of work outside of sitting there in the office for about an hour in the morning or half hour to one hour" (39).

This testimony received some support from two other witnesses. Lloyd M. Burdge, who was a leadman, thought that Belfield spent possibly 10% of his time with him between November and May on outside jobs (45), but Mr. Burdge later said, "My testimony was concerned with the time he was *inspector*" (46). Robert S. Edmisten, who was a mechanic, testified that he worked for Belfield a part of the period between November 15, 1944, and May, 1945, while he was a leadman, and that he saw Mr. Belfield engaged in the same work as an assembly inspector, and that he never had seen him walk through the shop that he didn't have some work of this type before he went through and that, when he was working in the plant on the days the witness was there, "he would be doing the same class of work that I would be doing, which would be *accepting or rejecting* parts that went into the machinery" (51), that while the witness was in

the plant, Belfield would be engaged in that kind of work about 75% of the time, as near as he could figure (51). The witness had never had an order from Belfield. He got his instructions from Fogman.

On the other hand, Belfield testified that he was a machinist by trade, that his life's occupation was in the machinery business, and that he had acquired "all the knowledge and skill for a rating in that department," and that prior to the war, he had been a journeyman machinist for fourteen years (33). He started to work as a shop inspector for Webster-Brinkley Co. some time in January, 1943. His experience as an inspector, therefore, covered more than a year and a half before he was chosen as Assistant Chief Inspector. At first, he was an inside assembly inspector, but was later transferred to the outside as an outside inspector. As assembly inspector, he watched the different machines being assembled and saw that "they were assembled right and that they worked free" (33). On the outside, he inspected parts being made in machine shops and foundries in Tacoma, Portland, Aberdeen and Hoquiam, Port Angeles, Port Townsend, Shelton and Everett. In August of 1944, the Inspection Department of the Webster-Brinkley Co. was reorganized. Belfield testified he "was brought in from the outside to help Mr. Fogman reorganize the Inspection Department and to acquaint him with the procedure" (34). He says that his primary basic duties in the plant were more or less to look over the inspection reports in the morning when they came in and to work with the other inspectors inside the plant and outside the plant. He

says that when he first came into the office in the morning, he looked over the inspection reports and sorted out the ones that were in question and "chased some of them down for Engineering or handed them in to Mr. Fogman." He admits that he was furnished with blueprints to guide him as to the way to inspect and what allowance should be made. He says that an inspector was furnished with a manual and required to be able to use it. He says the inspectors would merely go around in the outside plants and inspect the parts with the drawings. When he went out with Mr. Burdge, for instance, and they arrived at a plant, they got out their tools and inspected the parts with the drawing. Belfield took some parts and Burdge took others. But he admitted that he did sign reports of rejections and exceptions (57). He denied that when he was away from the plant with Burdge, he told him what to accept or what to reject. But on cross-examination, Belfield admitted that there were two types of inspection reports, that some were typed and some pencilled, that he did not personally make reinspection reports when he reinspected parts unless the part was pretty bad, that generally he would get the Engineering Department in on it or the Chief Inspector. He says the original inspectors generally signed their reports and that when he made an ordinary inspection report, he signed it and that the files and records ought to contain the ordinary inspection reports which he made during this period of time (57). (As we shall point out later, there is *not one* inspection report which is signed by Belfield as the original inspector). He admitted that the reports



which were O.K. and came in in pencil were sent through to the girl to be typed but that if the part were rejected, those reports were gone over by Mr. Fogman or himself and Engineering at different times (57). The favorable reports typed up by the girl were signed by her as a mere formality. He admitted that he signed all of the *rejection* reports when Mr. Fogman was absent (58). He insisted that there were other inspectors who signed them too, but later, he stated that he was then referring to the O.K.'d reports (58). He admitted that it was the function of Mr. Fogman and himself to determine whether or not rejected parts could be reworked or whether anything could be done with them or whether they should be simply cast aside (58). He grudgingly admitted that he did go out sometimes and reinspect those parts himself to see if he thought the original inspection was in error (59). He at first denied that any disputes ever arose between the Webster-Brinkley inspectors and the government inspectors, but he later admitted that there were differences of opinion and that these differences at times, especially in Mr. Fogman's absence, came up to him (59). He denied that Inspection had the final word on the matter but claimed that it would be up to Engineering. He admitted only one conference with the General Manager and the Works Manager or the heads of other departments in connection with some of these difficulties (60).

But the evidence as to the character of his duties, as it may be gleaned from the testimony of his own witnesses and the witnesses for the defendant, adds much to Mr. Belfield's admissions and disproves many of

his assertions. Mr. Burdge, one of the plaintiff's witnesses, testified in answer to a question how they inspected, that they had prints, tolerances were given on the prints that the parts were to conform to. The inspectors would measure with the micrometers for the sizes to determine if they were within the specifications. Lots of the pieces were large and it wouldn't be possible for one man to turn them over, to pick them up, or to do any handling that one would have to do to check them (46).

"Mr. Belfield was engaged in the same kind of work that I did, in lifting or turning these parts around. When I was handling a large, cumbersome piece, he helped me in turning or twisting it. He followed that practice during all of the time when we would be on the job together." (46)

He also testified as to the reports that were made on rejected material. He placed them in the office where there was a basket to receive them.

"On rejected materials, they were usually next considered by Mr. Belfield. So far as I know, he checked them over to see if they were made out correctly, that is, whether I had made an error in my pencil work on them."

When asked whether questions didn't frequently arise as to whether or not materials should be rejected or were usable, he said:

"Yes, sometimes, if they were very near to the tolerances on the print, the discussion would come up as to whether they could be used or passed."

Then he was asked:

“When you say that your judgment on the matter was final, isn’t it true, as a matter of fact, that many cases did go beyond you to Mr. Belfield or to his superior for further action?

A. That is true, if it was a questionable part.”  
(47)

He also testified that the inspections he made were original inspections, that is, the first inspection made by anyone connected with the Webster-Brinkley Co. He admitted that they occasionally had trouble over defective parts that did not come up to specifications. When asked whether he ever saw Mr. Belfield come down to reinspect parts, he said:

“I believe I have asked him to come down. We used to get castings sometimes that were faulty—that had cracks or were poor castings, and I was doubtful as to whether they could be used. I used to ask Mr. Belfield to come down and look at it.” (48).

In that testimony, Mr. Burdge has clearly indicated that he was not only responsible to Mr. Belfield but that Mr. Belfield was called upon to exercise a judgment and discretion superior to that of the ordinary inspectors. He also expressly admitted that he was supervised entirely by Mr. Belfield and Mr. Fogman (49). Mr. Edmisten in like fashion inadvertently showed Mr. Belfield’s function. He was asked (52):

“If a novel question came up and you requested Mr. Belfield, what did he do about it?”

A. “Well, he would say, ‘Well, let’s go over and take a look at it,’ and he would take his prints and tools required. He would look at it and say, ‘Well, maybe we had better make a re-

port on it and have Fogman or Engineering come down and take a look at it, or the Maritime inspectors'."

Again, he said (54):

"When seeing Mr. Belfield on the floor a lot of times I would ask his advice—*should we use it or shouldn't we use it*. That would be about all.

On this matter, Warren D. Thacker, who was at one time employed by the Webster-Brinkley Co. to organize the paper work and procedure of the Inspection Department but who is not now employed by the company, testified at length. He was an independent, disinterested, intelligent and well informed witness, who was in a superior position to observe Mr. Belfield's work. He was friendly to Mr. Belfield. The court can rely on his testimony as accurate. Mr. Thacker's particular duty when employed was to ascertain just exactly what the various individuals in the Inspection Department were doing and to assist in the reorganization of the department and to prepare a manual (73). He spent some four months in the department. He sat at the very same desk occupied by Tom Belfield. He discussed with him personally the manual which he was preparing (74). This manual outlined the duties of the Chief Inspector, his Assistant, and all the inspectors in the department. He says that for the first six weeks of his work, he was with Belfield almost constantly (74). Belfield went with him to each of the inspectors and introduced him. He and Belfield went about the plant for the purpose of investigating the duties of the inspectors and Belfield's duties as well. Belfield approved

the manual, and many of the things that were included as a part of his duties in the manual were suggested by Belfield himself (75). Thacker accompanied Belfield on his inspection trips outside the plant. He explains the inspection procedure. So far as original inspections and approvals were concerned, inspectors were stationed throughout the plant at strategic spots where inspection work might be required. Each of these inspectors was given a supply of forms which he filled out as he inspected the various lots and parts. There were three classes of inspection. There were those parts that were outright rejections, those parts that were complete acceptances, and then there were borderline cases. In cases of outright rejection where a part obviously could not be worked to dimension or it was not to dimension, the inspector was entitled to put a rejection tag on it. If it was obviously within the limits, the inspector was empowered to accept it. If it was a borderline case, he had to use his judgment. If he found it impossible or difficult to decide, he could and did call upon either Belfield or Fogman for a final decision on the matters within their discretion. If it was beyond their discretion, they sometimes called on other higher employees of the company—the Engineering Department (76).

The original inspector made out the reports of the original inspection in his own handwriting and had them at his work place in the plant. When he handed in his conclusions on the pencilled copy of the inspection report, he turned it in to the Inspection office at 4:00 o'clock in the afternoon. The following morning, the pencilled copy was checked by Mr. Belfield. Those

that were approved were laid in one pile and those that were rejections were laid in another pile. The *rejected* reports would be very carefully read and checked by Belfield and initialled by him and turned over to the girl for typing (76). The accepted reports went on to her and were typed by her without further comment or signature or checking. Then there were what were known as *rework orders*. If obviously the part could be reworked, that might be handled by a leadman. The other type of rework was determined by the mechanical engineer and was handled as a rejection. Mr. Belfield had actually to approve the rework orders because they were a rejection (77). Mr. Thacker also very fully described Mr. Belfield's duties. He said that he would meet Belfield at the office in the morning at 8:02 o'clock when he came in. The first thing Belfield would do would be to go through the pencilled copies of the reports.

"The normal course of things was for Tom to check the reports, approve them as to being correct or not correct. On these reports, in many cases, the actual dimensions themselves that were at fault were mentioned. Tom's duty, there, was to determine that the inspector was right in rejecting." (83)

He also went through the formal copies, that is, the typewritten copies that were for general distribution, in Mr. Fogman's absence, but if Fogman was there, Belfield went over the pencilled copies and then made a tour of the plant.

"We would drop into the Warehouse Department, go from there over to Assembly, around through the machine shop, consult with the var-

ious inspectors. They very frequently had borderline inspection problems that they didn't feel competent to decide which were left up to Mr. Belfield's judgment or Mr. Fogman's judgment, if he could be reached. Mr. Fogman was absent very much of the time. He was almost always late from one to three hours. He was away for two or three days at a time when he simply didn't show up for work. It had to be handled and was handled by his assistant. The acting Chief of the Department during Mr. Fogman's absence was Mr. Belfield (78). The reports were signed by Belfield if Fogman was not in. After the tour of inspection, we would return to the office ordinarily. Belfield was subject to call throughout the plant. You couldn't make a regular routine out of your calls. An inspector might call in and ask for Tom and ask for him to come and determine what was to be done—a borderline rejection (78). The inspectors from outside, Wallaston and Burdge, called him regularly. They were outside, away from the plant, were required to use a little better judgment and a little more independent judgment than the inside inspectors, but still they would ask where they should go on their next call occasionally, and inquire what should be done. Those calls were mostly directed to Mr. Belfield (79). Mr. Belfield directly supervised the work of ten to twelve people. The direct supervision of the people was through Mr. Belfield." (79)

Mr. Thacker testified that on his trips around with Mr. Belfield, he never saw Belfield make an original inspection (79). On those trips, he was either making the rounds of the Inspection Department employees or he was called out directly by an inspector because

of some indecision on the inspector's part (79). Very often, he would recheck work of an inspector or he might tell the inspector to go ahead and write up a rejection on this or he might say, "This is all right," inspect it, and the inspector would write up his report (79). Thacker reiterated that when he was walking around with Mr. Belfield, Belfield was not doing inspecting. He said that Belfield disliked paper work but liked to be out circulating in the plant and that never at any time when the witness saw him or was with him did he ever go to any inspection spot in the plant and station himself there for the purpose of inspecting parts that had not already been inspected by some other inspector and were not in doubt. He said he knew of conferences with Belfield in the Inspection office. He said he sat in on some of them. He knew that Belfield had conferences among the inspectors. Primarily, that is, he met with one or two inspectors regarding some particular part that was a borderline case (84).

"Someone has to decide those points, and it was Mr. Belfield's duty to determine—either the fact that they were usable or that they must be passed on to someone with greater authority to determine whether they could be used or not."  
(85)

Gerald S. McCarthy, the Works Manager of Webster-Brinkley Co., but no longer in its employ, stated that *he had heard the testimony of Mr. Thacker and that it was correct* (88). The Inspection Department was under Mr. McCarthy and he said that he held the Chief Inspector responsible for the entire activities of the department and, in the absence of the Chief In-



spector, he held the Assistant Chief Inspector responsible (88). He denied that he had ever gone over Mr. Belfield's head in dealing with the inspectors in the department. He testified that he had observed the operations of the Inspection Department throughout the entire plant, both morning and afternoon, every day when possible. As to the work of Belfield, he testified that he made trips to the outside plants and that Mr. Belfield would have occasion to inspect parts which were doubtful after coming from a sub-contractor's plant, that in some instances Belfield made trips to Western Gear Works to establish standards acceptable to the Inspection Department (90), that differences of opinion arose between the government inspectors and the Webster-Brinkley inspectors as to usability of parts and when they arose, doubtful parts were discussed (90). He said there were other flaws, such as welding and casting trouble, that those were matters of judgment to a much greater extent than tolerances, and that it was necessary for either Belfield or Fogman to discuss such matters with the Navy inspectors as to what they thought they could do to save such a piece if the Inspection Department thought it was justifiable to save it. He said that there were numerous conferences at which the top executives and Belfield and Fogman, either one or the other or both, were present in connection with the winch contract, because of some disagreements or differences of opinion with the Maritime Commission inspectors as to certain standards (91). The conferences were called at various times to determine the exact standards which the Webster-Brinkley Co. felt

made acceptable winches. He testified as to hiring or firing that Fogman had the right to hire or fire any employee in the Inspection Department and that Belfield's recommendations would receive consideration (91). He said that during the absence of Mr. Fogman, and his attendance was very irregular, Mr. Belfield was held responsible for the activities of the department. He said that he could not possibly have supervised the other activities in the plant, supervised the men in the Inspection Department, and made the decisions that were necessary and allocated the men to their duties in the day to day operation of that department, that Mr. Belfield did that work, that when Mr. Fogman was present, he in general took over the allocation of the work in the Machine Shop but that Belfield took care of the allocations in the assembly departments and on the outside, that in Fogman's absence Belfield took care of all of the assignments (92), that it was quite often necessary for Belfield or Fogman to reinspect parts for any one of a number of causes. The purpose would be to determine the final satisfactoriness based upon their knowledge and judgment or to refer the case, if it seemed questionable to them, perhaps to the Engineering Department or perhaps to McCarthy himself, for final decision (92). McCarthy said that his contacts with Belfield occurred several times a day personally, and anywhere from three to four times a day by telephone or intercommunicating system, that he saw him sometimes in the office, sometimes in the plant, and sometimes in McCarthy's office. In his opinion, Belfield did not spend over 5% of his time in original inspection work

(94). He said that he had been in the Inspection Department or inspection areas of the plant at times as many as six hours in a day and that he would say he spent 25% or a little more of his time in the area of the Inspection Department.

Mr. George Gregson, the General Manager of the Webster-Brinkley Co., testified that he knew Belfield and his work, that Belfield was responsible for the operation of the Inspection Department in the absence of his superior, Fogman (104); that he had spoken with him often, that in March, 1945, there was trouble on the winch contract; that the Maritime Commission took the position that the standards being set by the Inspection Department were not high enough, that that was a very serious matter and that on at least two occasions Belfield was present at conferences in the office of the President, Mr. Bannan, to advise the management and the President of the company as to the position Inspection took as against the charges made by the Maritime Commission inspection department (104).

But perhaps the most important piece of evidence showing that Belfield did have to exercise discretion and judgment is contained in defendant's Ex. No. 11-A and plaintiff's Ex. No. 6. There was in court every inspection report made during this period, both *acceptances and rejections* (66). They filled one and a half filing cases. As testified, articles which were passed by the original inspector were only formally approved. The initials of the Chief Inspector, "H. F." were affixed by the secretary (66). But all of the *rejections* by the original inspectors had to be ap-

proved by Fogman or Belfield. No other person was authorized to initial those reports. Of the thousands of reports in those files, 1,817 were *rejection* reports. Belfield picked out seven reports—we are not sure they were all rejections—where he says his initials were signed by someone else, but he does not know by whom. Four of those occurred on the same day, December 27, 1944, and all of them were between December 28, 1944, and January 4, 1945. When Belfield testified, there were tabs to mark these seven. Belfield and his counsel had the opportunity to examine every one of them. But he did not question any others. He finally said, “I never went through but just a few” (111). The fact is that 599 of those rejection reports were signed with Belfield’s initials.

But there is another very significant fact in the reports bearing upon and rebutting Belfield’s testimony. Belfield had testified he made many original inspections. Every report carried the name of the original inspector. On *not one* of the 1,817 reports does Mr. Belfield’s name appear as the original inspector. Wherever it appears, it is as *reviewing* inspector.

The lower court failed to distinguish between the two types of reports and utterly failed to grasp the significance of the rejections and the suggestions and directions frequently placed thereon by Belfield. He said (113):

“These reports seem to the court, as disclosed by the evidence, to have been in themselves something of routine which was done pursuant to established procedure. They were done in a large

percentage of the instances mentioned in the evidence as a matter of routine by some clerical employee or typist who had affixed the initials of Mr. Belfield. I believe, of those that were specifically mentioned or introduced in evidence, there was only one where the initials of Mr. Belfield were affixed by Mr. Belfield's own hand."

This indicates a complete misunderstanding of the evidence. The inspection reports which were O.K. were signed "H.F." by the secretary as a matter of routine (not with Belfield's initials), but *no witness testified* that the *rejected* reports were so signed. There were 1,817 rejection reports in the files in the courtroom subject to the inspection of Belfield and his counsel. Belfield referred to 10 reports in all, one signed by Fogman, two admittedly by himself (110). Mr. Washington's testimony (66, 67) is that 599 of the *rejection* reports (defendant's Ex. A-10) were signed by Belfield. Assuming the remaining 7 were all rejections, and we accept Belfield's testimony, the evidence still is that 592 were signed by him. Two hundred reports were introduced in evidence (defendant's Ex. A-11 and plaintiff's Ex. 6. There is, therefore, absolutely no support for the court's assertion that there was only *one* where the initials of Belfield were affixed by Belfield's own hand.

There is another vitally important feature of the rejection reports which was entirely overlooked by the lower court. The lower court referred to all of the reports as "routine." On a number of the *rejection* reports in evidence, the reviewing inspector and, in many cases this was Belfield, has in his own handwriting written directions or suggestions as to what

should be done with the rejected part. We do not have present access to defendant's Ex. A-11 and plaintiff's Ex. 6, but we ask the court to examine them in confirmation of our statement. Had the lower court examined them, he would have seen that those reports clearly showed that Belfield was exercising discretion and judgment in making very important decisions for his employer. As previously stated, it would seem to be a fact that the ordinary inspectors themselves exercised discretion and judgment. Even if it were a fact, as we believe it is not, that Mr. Belfield did a large amount of the same type of work as the inspectors under him, that would not remove him from the exempt class. The regulations of the Administrator lay down no such test. The test is not whether the supervising administrative official does some of the same type of work as those under him, but "whether he assists another employee who is a bona fide executive or administrator and exercises judgment and discretion in the performance of nonmanual work." We submit that it is clear that the only manual work done by Mr. Belfield was that incidental to the job of inspection, that even the duties of the original inspectors involved judgment and discretion, that that is what they were paid for and what justified their high salaries, that Mr. Belfield did not make the original inspections to any appreciable extent but that he did make the *review inspections*, all involving the exercise of discretion and judgment; that he assigned the inspectors in the assembly to their stations; that in Mr. Fogman's absence he made all of the assignments and certainly supervised all the

inspectors; that frequently he held conferences with his inspectors in the discussion of inspection problems; that he was frequently called upon by those inspectors to come out and discuss problems with them; that he was also frequently called by the outside inspectors for assignments and to discuss their problems; and that in connection with his work he was also called upon at times to make reinspections of parts as a check on the original inspections. His superiors testified that they held the Chief Inspector responsible for the operation of the department and, in his absence, Belfield, the Assistant Chief Inspector. It seems to us that there cannot be a shadow of a doubt that Belfield falls within the definition of the Administrator as laid down.

There is authority supporting this conclusion. In *Ashworth v. E. B. Badger & Sons Co.*, 63 Fed. Supp. 710, the employee was an inspector-expediter. He went out to the plants of suppliers as did Belfield.

“Equipped with plans, specifications and instructions from the Boston office, he would proceed to the plant of the vendor in question and present himself as the Badger inspector assigned to that job. He was then introduced around the plant and familiarized with plant procedure. Most, if not all, of his assignments were at plants engaged in the fabrication of pipe or the manufacture of pressure vessels. It was his duty to observe the fabrication or assemblage of the product from its initial stage until completion, making frequent checks to see that it conformed with the plans and specifications which he possessed. At times, these checks consisted of mere physical measurements. At other times, they

were merely visual inspections, and frequently they involved the observation of hydrostatic or pneumatic tests made by the employees in the particular plant. If a variation from the plans or specifications appeared, he would notify the management or its representative in the plant. If they refused to correct the variation or if they requested that it be allowed to remain, the plaintiff would normally consult the Boston office for instructions as to how to handle it. In any event, if plans or specifications were not met, the plaintiff had authority to inform the vendor that the product was not acceptable.”

He also observed and passed on crating and packaging. If a job moved too slowly, he would try to speed it up. This involved interviewing his vendors and contacting other Badger inspectors on the troubles outside his area. He performed some other duties along the same line. Judge Ford held that his work was along specialized lines requiring special training, experience or knowledge, that it clearly involved the exercise of discretion and independent judgment, that under the regulation “an employee possessing the authority to make decisions on his own account without discussion or instruction from others may be said to exercise ‘discretion and independent judgment’.” Judge Ford also remarked:

“Employees serving in the plaintiff’s capacity are more or less on their own in the field doing important work for the purpose of enabling the defendant’s business to function. The unsupported testimony of the plaintiff that he performed manual labor at times does not aid him. True, he performed some manual labor, but that was incidental to his work.”



*Dolan v. Zimmerman*, 65 Fed. Supp. 923, is helpful. There, Judge Ford had to pass on the classification of a large number of employees. One was an inspection engineer with work quite similar to Belfield's. He was held exempt as an executive. Judge Ford also passed the job of *Assistant Chief Industrial Engineer*, and held it exempt as administrative notwithstanding that the employee did "some routine work incidental to his duties as an executive employee." He found that an *Assistant Industrial Engineer* was employed in an "administrative capacity." He also passed upon the job of an *Assistant Expediter* who did internal expediting and carried on a number of special assignments. He held him exempt as an administrator.

In *Henry v. Chemical Construction Co.*, 11 Lab. Cas. 63,442, the court was dealing with an inspector-expediter whose job in many respects resembles Belfield's, except that it was a less important one.

"The plaintiff in the performance of his work inspected and either approved or rejected fabricated pipe and fittings and other materials at the vendor's plant. In the performance of his duties, the plaintiff was required and found to be familiar with specifications, blueprints, drawings and purchase orders. If the work did not conform to the drawing and specifications, plaintiff advised the vendor and immediately reported to the home office. If the home office advised him that the material should be accepted notwithstanding variations, plaintiff did then proceed to approve the material. He was required, however, to use his judgment and discretion in determining whether the work should be held up or permitted to proceed. When he approved, his de-

cision was accepted as final and not questioned, and when he determined the parts were up to standard the work proceeded and the said parts went into the job. At the various plants under his jurisdiction he took measurements of the parts, made visual inspections and observed tests made by the vendor's personnel after which he informed the vendor of his decision as to whether the material was acceptable."

The court held he was employed in an administrative capacity and therefore exempt.

In *Bender v. Crucible Steel Co. of America*, 71 Fed. Supp. 420, the court was dealing with a foreman who apparently had the duties of an inspector. As such, he exercised functions similar to those exercised by Belfield. The court said:

"The foreman, when a doubt arose as to the rejection or approval of a partly completed article, had the power to determine whether it should be rejected or an attempt should be made to perfect it. Also the foreman could determine whether or not material alleged to be of no use to the company could be removed from the plant."

The court also said:

"Some of the foremen included in the non-exempt work claimed by them the clerical work they performed in maintaining production and personnel records and making reports in connection with their particular department. Such work was clearly a part of supervisory duty also resembling the duty of a bookkeeper. Of the same nature was work necessary in the inspection and testing of the work of employees under supervision, even when a foreman in an emergency

temporarily aided an employee in the LaBelle Works in his job. Such aid was nonexempt work.”

The court held that the foremen were exempt.

## II.

The lower court found that Belfield was employed during the period in question for \$425.00 a month upon the basis of forty hours of work per week. The defendant maintained that the employment was for no definite number of hours per week but to do the job, in short, for a fluctuating number of hours per week.

The position of the court has no support at all in the evidence. Even Mr. Belfield testified that when he was employed, he was told that there was to be no overtime (38, 62). Later, when asked what was his basic week, he testified (55):

“After we went on salary, I think it was *supposed* to be 44 hours.

Q. A 44 hour week?

A. Yes.”

The amount awarded Mr. Belfield is calculated on the basis of employment for a 40 hour week. It is therefore clearly erroneous.

But we think that the testimony shows that the employment was for a fluctuating work week, that Belfield was employed to do the job and to spend as much time on the job as was necessary to do it properly, that his employment was on exactly the same basis as that of all of the other executive and administrative employees in the Webster-Brinkley plant. No one of them was employed for any definite num-

ber of hours per week and although all of them worked many hours in excess of 40 or 44 per week, no one of them received any additional compensation for it.

Mr. McCarthy, Works Manager and Belfield's superior, testified that he talked to Belfield, informed him what his salary would be and said, "The hours of work were explained as the hours that the plant operations normally worked and that the other executive and administrative personnel worked, which at that time was six days a week." (It appears elsewhere that the normal work day was 8 hours a day.) Again, on cross examination, he said, speaking of Belfield, "He never complained to me that he was putting in hours of overtime and was not paid for it. He complained that he was putting in hours of overtime but I don't remember him complaining about the overtime. He understood when he took the job that he was on a fixed salary.

"Q. You had that understanding with him?

A. I know I did."

Mr. Gregson, the General Manager and a member of the Operating Committee of which Mr. McCarthy was also a member, testified that all of the executive or administrative personnel were hired to do a definite job irrespective of the time it took, that none were ever hired for a definite number of hours per week (103). Belfield's own testimony and actions confirm these statements. It will be recalled that Belfield, prior to his appointment as Assistant Chief Inspector, had been previously employed as an inspector for about a year and a half at the hourly rate of \$1.50. During that time, a record had been

kept of his time and he had been regularly paid his basic salary and overtime at that rate (41, 38, and checks in plaintiff's Ex. 1). His pay checks carried on their face the exact number of hours worked per day.

After November 15, and after an application to the Stabilization Unit by which a salary of \$425 a month was approved, Belfield was paid semi-monthly on the basis of \$425 a month without overtime. After his employment on the salary basis, no check was kept of his time. Although he was paid no overtime during all the 25 weeks of his employment as Assistant Chief Inspector, he made no request for any overtime payment. He protested on the amount of the overtime he was called upon to put in but he never claimed that, under his contract of employment, he was entitled to any payment for it. The lower court was interested in and clarified this point. The court asked Belfield:

"I know, but whom did you inform that you had an overtime claim?"

Belfield replied, "I never said I had an overtime claim" (107). Later, he said, "Well, I told him that I was putting in quite a bit of overtime—I didn't like it, I told him."

Also on Belfield's own testimony, it was not until eleven months after he quit his employment with the Webster-Brinkley Co. that he called Mr. Gregson by telephone and said he was going to sue for his overtime (61).

Mr. Belfield's claim is inherently incredible. If he is to be believed, he was suddenly raised from \$1.50 an

hour to a basic regular rate of \$2.42 with overtime at \$3.63 an hour, and with no change of duties. That is a jump of 63%. No reason is suggested for any such increase. Such an increase is entirely inconsistent with the policy of the federal administration and the controls being exercised by it at that time. It is unbelievable in the light of the wage policies which were in effect in this country then that the Salary Stabilization Unit would have approved any such advance. If, on the other hand, Belfield were an administrator and his employment were for a fluctuating work week without overtime, then the action of the Stabilization Unit is understandable and consistent with Belfield's own actions. He had been accustomed to overtime as an inspector, he had been regularly collecting overtime, when on November 16, he is put on a salary. His time is no longer kept. He is paid semi-monthly, and accepted some fifty salary checks without any claims of overtime and never voiced even a suggestion of payment for overtime for a period of eleven months after he had quit his employment. We submit that the overwhelming weight of the evidence is to the effect that Belfield's employment was for a fluctuating work week. Even, therefore, if this court should disagree with us as to the proper classification for Belfield's job and hold that he came under the Federal Fair Labor Standards Act, it should still hold, under the evidence in this case, that the employment was for a fluctuating work week. In any event, there is no evidence at all supporting a 40 hour week.

**III.**

As to the number of hours worked, there is no evidence whatever except the unsupported testimony of Belfield himself. To understand how frail is that testimony, we ask the court to read pages 41, 44, 54 and 56 of the record. Belfield was first put on the stand and testified that he had kept some memoranda of his overtime, that part of it had been upon a time book and part on a desk calendar, that the time book was at his home in Spokane and that the kids had torn up the calendar. On the plaintiff's testimony that the record the plaintiff was trying to introduce had not been made up until after he quit his employment at Webster-Brinkley and not as a part of his daily work and routine, the court rejected the proposed exhibit. When asked to testify then as to the number of hours of overtime he worked between November 15, 1944, and May 13, 1945, he said:

"I can't answer that." (43)

His counsel then asked to withdraw him from the witness stand. He stepped down, consulted his counsel and then his counsel attempted to put him back on the stand, but the court would not permit it at that time (44). Later, the court did permit him to resume the stand. He then testified that he had been confused. He was then asked if he knew now the total number of hours he had worked. He answered:

"591 hours." (55)

Just that. Nothing more.

On cross examination, he was asked whether he could tell the total number of hours he worked in any

day or in any single week between November 20, 1944, and May 12, 1945. He said (56):

“From that paper that I turned in.

Q. You have no recollection apart from that paper, have you, of the time that you worked?

A. No, I don't believe I could. That has been quite a while ago.”

“That paper” is not in evidence. Is it not obvious that Mr. Belfield had no recollection of his overtime apart from the paper referred to which was itself secondary and self-serving and which is not in evidence? Is it not obvious that he had simply memorized the total of hours in Exhibit A to his complaint (6) after he had stepped down from the stand and been talked to by his counsel? The Federal Fair Labor Standards Act is set up upon a weekly basis, and provides for overtime above 40 hours per week. That Belfield worked some overtime is undoubtedly true, but his unsupported testimony given as it was given in this case is wholly inadequate to establish the amount. The lower court on this unsupported testimony credited Belfield with an *average* overtime of *24 hours a week for 25 consecutive weeks*, that is, 64 hours working time a week for every one of those 25 weeks. There was some evidence to show, in spite of the absence of records, that he did not actually work every day or for full days (81). During that period of time, the plant was working on a 48 hour week, the clerical employees on a 44 hour week, but both only six days a week. Is it credible that any man who thought he was hired for a 40 hour week or even for a 44 hour week would work 64 hours a



week for 25 consecutive weeks without a claim of overtime?

#### IV.

This specification of error depends upon the preceding. The court adopted a formula based upon the basic regular 40 hour week. It divided the annual salary of \$5,100 by 52, making the weekly wage \$98.08. The regular hourly rate was therefore \$2.45. The overtime of 24 hours a week was allowed on that basis. If the basic week had been 44 hours, the allowance by the same formula would have been \$1,978.85. If the basis of Belfield's employment was a fluctuating work week, then, of course, it is impossible to calculate the recovery under the Federal Fair Labor Standards Act because the plaintiff was unable to establish the number of hours actually worked during any specific week.

#### V.

This specification of error depends upon the foregoing specification. Since the original calculation of overtime was incorrect, the doubling merely increased the error.

#### VI.

Since the decision in the lower court, Congress has enacted the Portal-to-Portal Bill of 1947 approved on May 14 of that year. Under Sec. 11 of that Act, the Federal Fair Labor Standards Act is altered so that it is no longer mandatory upon the lower court to double the amount of the overtime as liquidated damages. If it appears to the court that the employer has acted in good faith, the court in its discretion

need not make any allowance for liquidated damages. It must be clear to the court that the employer in this case did exercise the highest degree of good faith. Belfield's duties were certainly such as afforded reasonable ground for the belief that he was an administrator. Under that belief, the employer applied to the Stabilization Unit of the Department of Internal Revenue for the fixing of a salary. The jurisdiction of that Unit depended upon the classification of the employee in one of the exempt classes. If not exempt, the whole matter would have been transferred to the Wage, Hour and Public Contracts Division of the Department of Labor. The Stabilization Unit, believing, on the showing made, that this position to which Mr. Belfield was subsequently appointed, was exempt as administrative in character, proceeded to fix the salary at \$425 a month. Relying upon this ruling, the W.B.Co. ceased to keep such records and it paid him regularly semi-monthly as it did all of its executives and administrative employees. Mr. Belfield was in no wise damaged. He made no request for overtime for more than eleven months after his employment ceased.

On the other hand, the effect of the ruling of the lower court was a great injustice to the employer. When Belfield was appointed Assistant Chief Inspector, he became entitled to a *guaranteed* monthly salary. For the 25 weeks he was employed, he received a total of some \$2,452. That was a high wage for the employment. In this case, he sued for overtime and the lower court proceeded to award him an additional sum of \$4,249.76, or almost twice the amount

of his agreed salary. The result is that if he should received the amount awarded by the lower court, Mr. Belfield will have received for his services during the 25 weeks \$272.00 a week. This windfall he gets in spite of his contract of employment, not because of any virtue on this part or any fault on the part of the Webster-Brinkley Co. We submit that such a result is more than unjust; it is literally outrageous. Had the lower court possessed any discretion at the time of entering judgment, as he now has under the Portal-to-Portal Act, we cannot believe he would have allowed double damages. In any event, if this court cannot itself dispose of the case finally, it should be sent back to the lower court for further proceedings under the law as altered by the Portal-to-Portal Act. *Alaska Juneau Goldmining Co. v. Robertson*, 12 Lab. Cas. 51,252 (U.S. Sup. Ct., June 16, 1947); *149 Madison Ave. Corp. v. Williams & Co.*, 12 Lab. Cas. 51,253 (U.S. Sup. Ct., June 16, 1947); *Lassiter v. Atkinson Co.*, 13 Lab. Cas. 63,947 (9th Cir., July 28, 1947); *Lasater v. Hercules Power Co.*, 13 Lab. Cas. 63,946 (U.S. Dist. Ct., E. D. Tenn., July 25, 1947).

But we believe the proper disposition of this case on the evidence calls for a reversal of the judgment of the lower court and dismissal of the cause.

CATLETT, HARTMANN, JARVIS & WILLIAMS

*Attorneys for Appellant.*



IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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WEBSTER-BRINKLEY COMPANY, a corporation,  
*Appellant,*

vs.

THOMAS R. BELFIELD, *Appellee.*

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UPON APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE WESTERN DISTRICT  
OF WASHINGTON, NORTHERN DIVISION

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**BRIEF OF APPELLEE**

---

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Seattle 1, Washington.

**FILED**



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**IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

<hr/> WEBSTER - BRINKLEY COMPANY, a corporation,  vs.  THOMAS R. BELFIELD,	}	<i>Appellant,</i>   <i>Appellee.</i>	No. 11680
<hr/>			

UPON APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE WESTERN DISTRICT  
OF WASHINGTON, NORTHERN DIVISION

---

**BRIEF OF APPELLEE**

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I.

The appellant contends under its first assignment of error that the primary question of the case is one of classification of employment, hence a question of fact and not of law, whether Mr. Belfield was an executive or administrative official of the Webster-Brinkley Company.

As the trial judge found the facts and was in a far better position to observe the witnesses and appraise their testimony than the appellate court, it would seem pertinent to first consider the conclusion reached by the trial judge and then examine the facts as to whether his views are sustained. The Court's findings in part are as follows:

“As to the Plaintiff Belfield, I have considered all that has been testified to and all that has been said by counsel on both sides. It seems to me, and the court finds, concludes and decides that Mr. Belfield, while occupying a nominal rank in advance of the other inspectors, did nothing, in reality, different from what they did except to sign some inspection reports or to permit his initials to be attached or affixed to certain inspection reports. Insofar as that was done, in this instance, it was a mere clerical performance.” (Tr. 112)

Turning now to the facts, we find that the Webster-Brinkley Co. was engaged in furnishing Marine supplies, particularly windlasses, capstands, steering gears, and cargo winches on contract to the government. The most important contract during the period we are considering was the winch contract (Tr. 39).

Mr. Gregson, general manager, admitted that this all important contract was losing money and said “\* \* \* the loss was quite sharp, and it was very upsetting, that is, the possible loss was quite sharp and upsetting” (Tr. 105). He stated that as general manager he had a choice to stop further loss between re-organizing the plant or reducing salaries, and promptly added, “we could not reduce salaries” (Tr. 105). Why? Because salaries were frozen. Mr. Gregson therefor never had but one choice, and that was reorganization of the plant, which he promptly set about to do.

The reorganization was effected by “promoting” employees to executive or administrative positions, thus actually reducing their salaries by eliminating

over-time pay. That this was the purpose and object of the reorganization becomes clear when we consider that Mr. Belfield was promoted in August, 1944, when he was working as high as 15½ hours a day and averaged 65 hours a week (Tr. 38). His wages for a 65-hour week would be \$116.25. The rate of pay he was then receiving, \$1.50 an hour, plus time and one-half for overtime, made his average income in excess of \$450.00 per month. Mr. McCarthy, Efficiency Expert and Works Manager, corroborates the testimony of the General Manager by admitting that he definitely felt it was a promotion for Mr. Belfield to be called assistant chief inspector instead of inspector, even though his salary was reduced. His exact testimony is as follows:

“Q. Do you mean that a man who had an income of \$450.00 a month as wages and overtime and he is given \$425.00 in salary, he is promoted—because he has a title? Is that correct?

A. Well, to my way of thinking it is.” (Tr. 96)

Needless to say that Mr. McCarthy “was a new hand at the bellows” but made an able assistant to the general manager in carrying out the “reorganization.”

Now, what did they tell Mr. Belfield about the reorganization? He testified as follows:

“Mr. Fogman ‘who held title of Chief Inspector’ told me that I wouldn’t have to work over-time; that the job would be easier; that I could be home every night, and that I would get \$2.00 and something an hour.” (Tr. 39)

Why did this appeal to Mr. Belfield? He says:

"At that time \* \* \* I had been working long hours for over two years from January 1, 1943, to May, 1945. In all that time I missed very few days and in the last year had perfect attendance record, never having missed a day during the time we were making the winch job." (Tr. 39)

He was, however, not too well sold on the argument, so a further promise was made to come "inside" two or three months and he then could return "outside." But "This was later changed. They put me on a monthly salary anyway" (Tr. 38). This "promotion" of Belfield was not a voluntary act on his part, but the pre-emptory order of the corporation. Did the Company keep its promises to Belfield? Belfield answers as follows:

"Q. What was the difference in your work in the plant after August to what it had been before?

A. None. It was the same type of work outside of sitting there in the office for about an hour in the morning, or half hour to one hour. That started in August. The duties after November 15 were just the same as prior to that. I was asked by Mr. Fogman to work overtime after November 15 and I had to do so. At that time we were frozen in our jobs." (Tr. 39-40)

He stated that he protested to Mr. McCarthy and Mr. Fogman several times, and that he kept a record of his overtime, and turned in his over-time to Mr. Fogman's secretary, and he showed it to Mr. Fogman several times (Tr. 40). There is no evidence that he performed any different work except initialing the inspection records as any other ordinary inspector.

He exercised no discretion. He did not supervise, regulate or direct other employees (Tr. 40). He had no authority to hire or fire (Tr. 40), and his work was of the same nature 90 per cent of the time as that performed by non-exempt employees (Tr. 36). He had no authority to leave the plant without a slip signed by Fogman (Tr. 63). Belfield's ordinary day would be as follows: He would arrive around 7:00 o'clock, although most of the salaried men came in around 8:00 o'clock. He looked over the inspection reports that came into the office from the day before, sorted out the ones that were in question, chased some of them down for engineering or handed them into Mr. Fogman who would take care of them. He had no final say-so at all. When he arrived in the morning the rejected and o.k.'d reports were in the "box."

"Q. Now, what independent, discretionary authority did you have over these reports, if any?

A. None.

Q. Did anybody else do the same thing that you did with regard to these reports?

A. Yes. I merely separated the ones that were OK from the ones that were rejected. They eventually went to Mr. Fogman, the Chief Inspector.

\* \* \* This work probably took half an hour to one hour, and then I went out in the plant and worked with the rest of the inspectors in the assembly line in the shop." (Tr. 35)

Mr. Belfield was corroborated by other men who worked with him, namely, Robert S. Edmisten (Tr. 51), and Lloyd M. Burdge (Tr. 45-6). Those that disputed him in any manner were officers of the

company who had other duties and who never had occasion to be around where Mr. Belfield worked only a small percentage of their time. Mr. McCarthy was in the plant twice a day when he could (Tr. 89). Later he thought 25 per cent of his time (Tr. 99).

It is true that Warren D. Thacker, who is extensively quoted in appellant's brief, stated that he worked for about four months in the plant making up a manual for the use of inspectors. and sought considerable information from Mr. Belfield (Tr. 74). But his evidence is unconvincing. He makes frequent references to Mr. Belfield as "Tom," and that they were bosom friends (Tr. 82). Appellant's counsel states in his brief that from this fact the court can rely on his testimony as accurate. A reading of his testimony, however, would convince anyone that if Mr. Thacker was a friend of Mr. Belfield's, Mr. Belfield didn't have any friends. He could well join with his prayers the petition, "May God deliver me from my friends, I will take care of my enemies." Even Mr. Thacker admits that he never saw Mr. Belfield after five o'clock in the evening (Tr. 84), which would seem to be about the time Mr. Belfield was half through his day's work. He also admits there were days he spent one, two, three or sometimes five hours with Belfield (Tr. 84). But the fact remains that about the only time Mr. Thacker really saw Mr. Belfield was early in the morning when they walked about the plant (Tr. 83).

We turn now to what counsel says is "perhaps the most important piece of evidence showing that Bel-



field did have to exercise discretion and judgment," and is contained in defendant's Exhibit No. 11-A and plaintiff's Exhibit No. 6.

Exhibit No. 11-A was introduced in the testimony of Herbert R. Washington, Assistant Treasurer of the Company. Mr. Washington stated that he compiled the exhibit from a large number of original inspection records which were made by Mr. Belfield of rejected materials, and bore his initials. The original records from which the exhibit was compiled was contained in two filing cabinets in the court room open for the inspection of the court and appellee. These files purported to show that out of 1817 rejection reports the genuine initials of Mr. Belfield appeared on 599. Mr. Washington compiled this exhibit personally and was familiar with the whole matter (Tr. 71).

In clarifying the exhibit somewhat Mr. Washington made a very important statement, namely: that the record merely means that Mr. Belfield signed a typewritten report as assistant chief inspector, but it does not mean that he made the inspection or rechecked the inspection, but it only meant that the chief inspector had to countersign all the forms that showed rejections (Tr. 69).

After the introduction of this testimony the court interrogated Mr. Belfield, who stated that in the mornings he would sign some of these reports, but it wasn't necessarily part of his daily work as he would be gone from time to time. The Court thereupon admitted Exhibit 11-A with the statement that he

thought it was proper to receive in evidence the summary of inspection reports to avoid the necessity of examining each inspection report separately (Tr. 70).

Later, during the trial, an examination was made of the original records and several of the original inspection reports were taken out of the filing cabinet at random and became plaintiff's Exhibit 6. From the testimony of Mr. Belfield and from plaintiff's Exhibit 6, it became clear that the original typewritten rejection records that contained the penciled initials purportedly of Thomas R. Belfield were forgeries, or at least were not made by him (Tr. 109-110). Belfield had examined other original inspection records besides those introduced in evidence as plaintiff's Exhibit 6, and found that they also contained forgeries of his initials. It was now clear to everyone that Exhibit 11-A had been compiled without any thought of whether Mr. Belfield's initials were genuine or not, and while his initials might have appeared 599 times on the original records, it by no means meant that he had personally signed that many reports. It did mean, however, that most anyone who desired could sign his initials to these rejection records, and did so. These facts rendered Exhibit 11-A worthless, and appellant never attempted to re-establish it.

It is a great surprise to appellee that appellant now designates Exhibit 11-A as "the most important evidence in the case," for if it is, then appellant just does not have any. The trial judge in his memorandum decision referring to this "important evidence" clearly indicates that he took into consideration all of the

original records as well as Exhibit No. 6, when he stated:

“Those reports seemed to the court, as disclosed by the evidence, to have been in themselves something of routine which was done pursuant to established procedure. They were done, in a large percentage of the instances mentioned in the evidence, as a matter of routine by some clerical employee or typist, who had affixed the initials of Mr. Belfield. I believe, of those that were specifically mentioned and introduced in evidence, there was only one where the initials of Mr. Belfield were affixed by Mr. Belfield’s own hand.” (Tr. 113)

It would be needless extension of appellee’s brief to discuss other matters under the first assignment of error, as the question of the classification of Mr. Belfield’s employment is one of fact and rested in the sound discretion of the trial judge. We believe the evidence shows no abuse of that discretion and that there was ample evidence to support the decision.

## II.

Under appellant’s second assignment of error it maintains that there was no evidence to support the Court’s finding of the overtime hours of Mr. Belfield. In its brief appellant sets out the testimony of Mr. Belfield, but not full enough to apprise the court as to the true facts. The testimony was as follows:

“THE COURT: The total was what, as you stated just now?

THE WITNESS: 591 hours.

Q. What was your basic week, Mr. Belfield?

A. Well, while I was at \$1.50 it was supposed to be 40 hours. We got paid for overtime over 40 hours. After we went on salary, I think it was supposed to be 44 hours.

Q. A 44-hour week?

A. Yes.

Q. This overtime is computed on that basis, is it?

A. Yes.” (Tr. 55)

Mr. Burdge corroborates Belfield. He says:

“I was paid an hourly rate of \$1.50 an hour. I got overtime after eight hours a day, regardless of the week.” (Tr. 44)

Against this positive statement of Mr. Belfield and Mr. Burdge we do not find any official of that company that makes any positive statement at all. As appellant sets out in its brief (p. 40), Mr. Gerald S. McCarthy testified that all executives were hired to do a definite job irrespective of the time it took. That none was ever hired for a definite number of hours per week (Tr. 103).

On what evidence would the Court be able to make a finding, except on the evidence of Mr. Belfield and Mr. Burdge and exhibits showing Mr. Belfield's overtime pay? The appellant offered nothing and certainly should not now be heard to complain. The right to overtime pay is statutory being covered by Sec. 207, Fair Labor Standards Act, which is as follows:

“No employer shall \* \* \* employ any of his employees \* \* \* for a work week longer than 40 hours \* \* \* unless such employee receives com-

pensation for his employment in excess of the hours specified at a rate of not less than  $1\frac{1}{2}$  times the regular rate at which he was employed.”

The duty of keeping the overtime of Mr. Belfield was that of the Webster-Brinkley Company as the obligation was statutory. The fact that it did not do so cannot defeat the right of Mr. Belfield to recover. As was stated by the Supreme Court of the United States in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 Sup. Ct. 1187:

“The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of Sec. 11(c). And even where the lack of accurate records grows out of a bona fide mistake as to whether certain activities, or non-activities, constitute work, the employer having received the benefits of such work, cannot object to the payment for such work on the most accurate basis possible under the circumstances.”

This view followed in other cases, namely:

*Lawley v. South* (C.C.A.) 140 F.(2d) 439;

*Joseph v. Ray* (C.C.A.) 139 F.(2d) 409.

Appellant complains that Mr. Belfield, while telling the defendant's officials that he worked overtime and complained bitterly of the long hours, never actually demanded payment, and therefore should be denied payment. The burden, however, was not upon Mr. Belfield to make such demand as the right to overtime could not be waived by him. The rule against estoppel

or waiver by failure to demand pay being well stated in the cases of

*Dize v. Maddrix*, 65 U.S. 895, 324 U.S. 697  
and

*Rigopoulos v. Kervan*, 140 F.(2d) 506.

### III.

Appellant contends under this assignment of error that Mr. Belfield's overtime rests upon very frail testimony and asks the Court to examine certain pages of the transcript. We join in that request.

We are certain that the evidence discloses that Mr. Belfield kept a daily written record of his overtime. He requested the company to keep a record of his overtime, and insisted upon Mr. Fogman's secretary keeping a record of it (Tr. 40).

He had with him in court a statement compiled from his original records showing very minutely the amount of overtime. His failure to testify in the first instance the number of hours of overtime was not due to a lack of knowledge, but the confusion in his mind as to whether he should be permitted to testify or not. When he was recalled to the stand he explained it as follows:

"Q. What was the confusion in your mind?

A. Well, I thought I couldn't answer that question on that over-time — the total amount of overtime that I had. I didn't think I could answer that the same as it was on the paper.

Q. From the ruling the court has made and from what was said?

A. That is right." (Tr. 54-55)

This confusion was natural for a man of Mr. Belfield's temperament and education. The court observing him was aware of it for in his memorandum decision he states:

"I carefully observed Mr. Belfield's demeanor on the stand, his manner of testifying, and all of the other measuring sticks by which triers of the fact may properly determine the credibility of a witness, and I would never be impressed that Mr. Belfield is a man of such a nature or disposition—even if he had sufficient ability, in fact—to put in a position of discretion and important supervision." (Tr. 113-114)

The primary and statutory duty of keeping Mr. Belfield's overtime rested upon the appellant, and what Mr. Belfield supplied in the absence of any other record, was amply sufficient to support the findings of the court.

The Supreme Court in *Anderson v. Mt. Clemens Pottery Co.*, *supra*, passed upon this very question and resolved it in favor of the appellee.

#### IV.

Appellant contends that specification of error under this title depends upon the finding of the court on its preceding specification of error.

We believe that sufficient argument has already been devoted to this subject, and, further, that the matter of overtime is statutory and based upon 40-hour week.

Sec. 207, Fair Labor Standards Act.

## V.

The specification of error under this head depends upon the previous one, as it only has to do with doubling the amount found. We believe it is sufficiently answered.

## VI.

Under this head the appellant discusses the Portal-to-Portal Bill of 1947, and requests this Court to take judicial notice of it. Appellant bases this request for the reason and on the ground that it must now be clear to this court that the employer did exercise the "highest degree" of good faith; that Mr. Belfield's duties were certainly such as afforded reasonable grounds for the belief that he was an administrator; that they relied solely on the Stabilization Unit, and that Mr. Belfield was in no wise damaged since he made no request for overtime for more than eleven months after his employment ceased.

We do not believe that the observations of appellant are correct or are substantiated by the record. They did not in good faith advance Mr. Belfield to an executive or administrative position, but in bad faith, in order to make a profit at a time when the company was losing money, took a good working man who was earning a large salary by overtime work, a faithful employee who never missed a day's work, and "promoted" him by giving him a title, but actually reduced his pay. This was all done without the consent of Mr. Belfield as was stated on cross-examination by Mr. Washington:

"I did not say that the application made to the



Wages & Hours people was brought to the attention of Mr. Belfield.” (Tr. 73)

In truth and in fact the promotion was made without the knowledge or consent of Mr. Belfield. The promotion was accomplished on the fictitious and fraudulent promises of Mr. Fogman and Mr. McCarthy that he “wouldn’t work overtime,” “that the job would be easier,” “that he would be home every night,” “that he would get over \$2.00 an hour” (Tr. 39), and “to come inside for a little while and then he could go outside” (Tr. 38).

When these worthless promises were later contemptuously disregarded Belfield was held on his job as a virtual slave for, as he says:

“At that time we were frozen in our jobs.”  
(Tr. 40)

This odious conduct finally became so burdensome that even the stark reality of unemployment could no longer keep Mr. Belfield on the job, and he sent his written resignation to the company which is admitted by Mr. McCarthy (Tr. 97). Belfield further testified:

“I protested to everybody I seen there, toward the last \* \* \*.” (Tr. 63)

He was finally permitted to transfer if he went to Western Gear, who, strange as it may seem, had the same president, Mr. Bannan, as the Webster-Brinkley Co. (Tr. 63). Is this the conduct of an executive or a slave?

As an example of the double talk indulged in by the Company in behalf of Mr. Belfield we only have to

turn to the testimony of Mr. McCarthy regarding this so-called "promotion." Mr. McCarthy testified:

"Q. You told him what his salary would be?

A. That is correct.

Q. And he was happy to take it, was he?

A. Yes, I believe he was.

Q. Did he say he was?

A. He didn't express himself as being unhappy." (Tr. 97-98)

It would be hard to find an oracle from Ancient Dehli better phrased than this. Mr. Belfield flatly denied that he ever talked to Mr. McCarthy about a salary until after he had been placed on one (Tr. 107). When we consider that Mr. Washington corroborates Mr. Belfield when he stated that the application to the Wages and Hours people was never brought to the attention of Mr. Belfield, is it any wonder that the Court believed the testimony of Mr. Belfield and not the officials of the Webster-Brinkley Company?

From the fact that all of this testimony went into the record prior to the enactment by Congress of the Portal-to-Portal Act of 1947, approved May 14, 1947, when the good faith of the company was not an issue, it must now be apparent that if it had been, this record could have been greatly extended on this particular issue. The mere application to the Stabilization Unit to advance or promote an employee can easily be done in bad faith, as well as good faith, as fictitious duties and responsibility may be claimed in the application but later never put into practice. We must resolve that the application for Belfield was made in

bad faith by the Webster-Brinkley Co., since the application was made without his knowledge or consent. It was not a bona fide promotion because his duties were not changed, only increased, but his salary was decreased.

The Webster-Brinkley Co. received the benefits of Mr. Belfield's services and have become unjustly enriched thereby. It comes with poor grace on their part to now try to pay off Mr. Belfield with a title and conversation, simply because he made no specific demand for overtime pay until eleven months after his employment ceased, although during his employment he made constant complaint. A workingman cannot be deprived of his rights simply because he does not know what they are.

Appellant stoutly maintains that the granting of overtime to Mr. Belfield is a great injustice to the employer, since Mr. Belfield had become entitled to a "guaranteed" monthly salary and anything more would be a windfall. The amount of the judgment, \$4249.76, includes one-half the amount as a penalty. The remaining one-half was payment for 591 hours of overtime pay which the company wrongfully withheld from Mr. Belfield. The magic of this argument seems to be in the word "guarantee." But whom did it guarantee, Mr. Belfield, or the appellant? Mr. Belfield had never earned less than the amount they were offering as salary and frequently earned far more. The "guaranteed" salary only guaranteed the Webster-Brinkley Co. that it would not have to pay overtime to Mr. Belfield, that is, unless this Court compels

them to do so. The Wage and Hour Act was to circumvent the making of profits from extra burdens being wrongfully placed upon labor.

We know that there are still those who out of greed for gain do not shame to oppress the workingman, for the lust is so powerful that it deranges their sense of justice and they fall an easy prey to low desires, and finally hold that all means are good which enable them to increase their profits. War contracts have always been a source of easy returns. Any corporation quickly formed and quickly dissolved, with its divided responsibility and limited liability, with no heart and no conscience, and with its memory only a filing cabinet, can always be made a suitable instrumentality for man's exploitation. History is replete with the examples of the abominable abuses practiced under the corporate structure where divided responsibility hardens men against the sting of conscience and leaves them only the unquenchable thirst, "to show a profit." To liken such an organization to a single employer with a few workingmen, who has from a lifetime of unremitting toil amassed a modest fortune, and ask the same measure of justice in its own behalf, is an insult to intelligence. The law is the only curb to such avarice and needs above all to be fearlessly and with unwearied zeal enforced. It would be a grave injustice to let the 1947 Portal-to-Portal Act relieve the appellant from an obligation rightfully imposed, or send the case back to the District Court for further trial, for to do so would only wear down the appellee with endless and fruitless litigation.

We believe the proper disposition of this case is to affirm the judgment.

Respectfully submitted,

CHARLES H. HEIGHTON,  
LEO W. STEWART,

*Attorneys for Appellee.*



No. 11682

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United States  
Circuit Court of Appeals  
For the Ninth Circuit

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MATTHEW WRUBLEWSKI,

Appellant,

vs.

CAPTAIN S. X. McINERNEY,

Commanding Officer of United States Naval  
Receiving Station, Yerba Buena Island, San  
Francisco, California, and Rear Admiral D. B.  
Beary, United States Navy, Commandant  
12th Naval District, San Francisco, California.

Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Northern District of California,  
Southern Division

FILED

SEP 18 1947

PAUL P. O'BRIEN, V





United States  
Circuit Court of Appeals  
For the Ninth Circuit

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MATTHEW WRUBLEWSKI,

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vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ern Division.

Decision of the Honorable Louis E. Goodman,  
District Judge.

In the District Court of the United States, Northern  
District of California, Southern Division

No. 26862-G

In the Matter of

MATTHEW WRUBLEWSKI, Ensign, U. S. N.,  
Petitioner.

PETITION FOR WRIT OR HABEAS CORPUS

To the Honorable, the Judge the United States  
District Court, Northern District of California,  
Southern Division:

Now comes petitioner and files this his petition  
for a writ of habeas corpus and alleges as follows,  
to-wit:

I.

That petitioner is a citizen of the United States  
of America and is of the age of 25 years. [1\*]

II.

That petitioner is illegally detained, unlawfully  
imprisoned, confined and restrained of his liberty  
at the United States Naval Receiving Station,  
Yerba Buena Island, San Francisco, California,  
which said naval station is under the command of  
Captain S. X. McInerney, commanding officer of  
said station, and Rear Admiral D. B. Beary, United  
States Navy, Commandant, 12th Naval District,  
San Francisco, California; that said station wherein  
your petitioner is now confined is located in the  
County of San Francisco, within this district; that

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\* Page numbering appearing at foot of page of original certified  
Transcript of Record.

such detention, confinement, restraint and imprisonment and each of such acts is unlawful, illegal and without authority of law for the reasons hereinafter set forth:

That petitioner is an officer of the regular Navy, Ensign, U.S.N., having enlisted in the naval service of the United States on September 12, 1939, as an apprentice seaman; that petitioner has served continuously, honorably, efficiently, and dangerously throughout World War II as a combat pilot in the Naval Air Corps; that petitioner was commissioned as an ensign in the regular navy in August of 1943, after serving four years as an enlisted man with a conduct record free from blemish; that all marks received by petitioner in his naval career from September, 1939, until August, 1944, were never less than 3.5 out of a possible 4.0 perfect rating in conduct, proficiency in rating, seamanship, mechanical ability and ability as a leader of men.

That on or about December 11, 1944, petitioner was duly tried before a naval general court martial convened by the Commandant, 14th Naval District, Pearl Harbor, Territory of Hawaii, for the following offenses: (1) Murder

“In that Matthew Wrublewski, Ensign, U. S. Navy, while so serving with patrol squadron two hundred, Fleet Air Wing Two, U. S. Pacific Fleet, did, on or about August 7, 1944, at the U. S. Naval Air Station, Kaneohe Bay, Oahu, Territory of Hawaii, wilfully, feloniously, with malice aforethought, and without justifiable cause, assault,

shoot at, [2] and strike with a bullet fired by him, the said Wrublewski, from a deadly weapon, to-wit, from a loaded Smith and Wesson revolver, calibre thirty-eight, one Roland F. Travis, lieutenant (junior grade), U. S. Naval Reserve, and did therein and thereby then and there inflict a mortal wound in and upon the chest of the said Travis, of which said mortal wound so inflicted, as aforesaid, the said Travis died at or about 7:15 p.m., on August 7, 1944, the United States then being in a state of war.”

(2) Assault with intent to commit murder

Specification I

“In that Matthew Wrublewski, Ensign, U. S. Navy, while so serving with patrol squadron two hundred, Fleet Air Wing Two, U. S. Pacific Fleet, did, on or about August 7, 1944, at the U. S. Naval Air Station, Kaneohe Bay, Oahu, Territory of Hawaii, wilfully, maliciously, and without justifiable cause, assault with a revolver one Roland F. Travis, lieutenant (junior grade), U. S. Naval Reserve, with the intent in him, the said Wrublewski, to kill and murder the said Travis, the United States then being in a state of war.”

Specification II

“In that Matthew Wrublewski, Ensign, U. S. Navy, while so serving with patrol squadron two hundred, Fleet Air Wing Two, U. S. Pacific Fleet, did, on or about August 7, 1944, at the U. S. Naval Air Station, Kaneohe Bay, Oahu, Territory of



Hawaii, wilfully, maliciously, and without justifiable cause, assault with a revolver, one Robert M. Nason, lieutenant (junior grade), U. S. Naval Reserve, with the intent in him, the said Wrublewski, to kill and murder the said Nason, the United States then being in a state of war.”

### Specification III

“In that Matthew Wrublewski, Ensign, U. S. Navy, while so serving with patrol squadron two hundred, Fleet Air Wing Two, U. S. Pacific Fleet, did, on or about August 7, 1944, at the U. S. Naval Air Station, Kaneohe Bay, Oahu, Territory of Hawaii, wilfully, maliciously, and without justifiable cause, assault with a revolver one Joseph A. Osborn, then lieutenant (junior grade), U. S. Naval Reserve, with the intent in him, the said Wrublewski, to kill and murder the said Osborn, the United States then being in a state of war.”

Following said trial, the naval court found the accused guilty of the charge of murder and the specification thereunder proved; the same court acquitted the accused of the second charge of assault with intent to commit murder and found the words of the three specifications thereunder not proved.

That the naval court martial had no jurisdiction over the crime of murder, which alleged “murder” was “not committed [3] without the territorial jurisdiction of the United States” in that said alleged “murder” was not alleged to have been committed aboard a vessel of the United States on

the high seas; that despite the lack of jurisdiction of the court over the charge of murder and further despite the acquittal of the accused on the charge of assault with intent to commit murder, petitioner has been confined in various naval prisons both in the Pacific area and within the continental limits of the United States, continuously from August 7, 1944, and is still so confined as an officer prisoner at the United States Naval Receiving Station, Yerba Buena Island, San Francisco, California.

That on November 9, 1945, a letter was originated by the Judge Advocate General's office, Washington, D.C., to the Bureau of Naval Personnel, calling attention to the fact that the trial, proceedings, findings and sentence should be set aside as void for lack of jurisdiction over the crime. This letter, or "read-off," was made known to your petitioner on February 13, 1946, over 18 months after petitioner was placed in confinement; that following this review by the Judge Advocate General's office, which determined the illegality of the trial for murder and the sentence resulting therefrom, petitioner was not restored to duty as a naval officer, and was not released from confinement or prison, was not ordered to a new trial, and otherwise derived no benefit whatsoever from the decision by higher naval authority that his trial, the proceedings, findings and sentence were all void as to the first charge of murder from inception. Petitioner was then transferred to the United States Naval Hospital, Oakland, California, for "observation"

and was there confined in a prisoner status without the liberty to leave the building or to place a telephone call concerning his predicament. This period of observation resulted in petitioner being pronounced sane, sound, and fit for duty. Following a period of observation at [4] the United States Naval Hospital, Oakland, California, petitioner was transferred back to the navy prison from which he came and was confined as a regular convicted criminal. Petitioner was sentenced to ten years' imprisonment as a result of the herein mentioned void trial proceedings; that petitioner has already been imprisoned for over 30 months.

### III.

That your petitioner, at his first opportunity, sought relief through the offices of the 12th Naval District to be transferred out of this prison to some quarters and duty more appropriate to an officer of the navy who had up to that time been convicted of nothing.

Your petitioner has through his counsel sought to derive some benefit from the application of the rule that petitioner is innocent at least until he walks into the Naval General Court Martial.

### IV.

That on or about April 3, 1946, your petitioner was still confined as a convicted prisoner at the United States Naval Prison, Mare Island, California, petitioner was under no pending charges and was serving a "sentence" as the result of a

void trial and conviction of the charge of murder. Your petitioner sought relief in this honorable court on a petition of writ of habeas corpus. This action brought forth the charges and specifications by the Navy Department showing cause why petitioner was restrained. A charge of scandalous conduct tending to the destruction of good morals was then 1946. Your petitioner waited from that date until July 25, 1946, at which time the charge under which petitioner was being held was withdrawn by the Navy Department and new charges were finally preferred against petitioner, namely, voluntary manslaughter and a second charge, involuntary manslaughter, as herein [5] set forth:

### Charge I

#### Voluntary Manslaughter

#### Specification

“In that Matthew Wrublewski, Ensign, U. S. Navy, while so serving with Patrol Squadron Two Hundred, Fleet Air Wing Two, U. S. Pacific Fleet, did, on or about 7 August 1944, at the U. S. Naval Air Station, Kaneohe Bay, Oahu, Territory of Hawaii, feloniously, wilfully, without justifiable cause, assault, shoot and strike with a bullet fired by him, the said Wrublewski, from a deadly weapon, to-wit, from a loaded Smith and Wesson thirty-eight calibre revolver, one Rowland F. Travis, lieutenant (junior grade), U. S. Naval Reserve, and did therein and thereby, then and there, inflict a mortal wound in and upon the chest of the

said Travis, of which said mortal wound so inflicted as aforesaid, the said Travis died at about 1915 on 7 August 1944; the United States then being in a state of war.”

## Charge II

### Involuntary Manslaughter

#### Specification

“In that Matthew Wrublewski, Ensign, U. S. Navy, while so serving with Patrol Squadron Two Hundred, Fleet Air Wing Two, U. S. Pacific Fleet, having in his possession a loaded Smith and Wesson thirty-eight calibre revolver, and it being his duty to handle said revolver with due caution and circumspection, did, on or about 7 August 1944, at the U. S. Naval Air Station, Kaneohe Bay, Oahu, Territory of Hawaii, feloniously neglect and fail to handle said revolver with due caution and circumspection, in that he, the said Wrublewski, did cause said revolver to be discharged, and did assault and strike in and upon the chest with a bullet fired from said revolver by means of said discharge, one Rowland P. Travis, lieutenant (junior grade), U. S. Naval Reserve, and did therein and thereby, then and there, mortally wound the said Travis, as a result of which said mortal wound so inflicted as aforesaid he, the said Travis, at or about 1915 on 7 August 1944, at said station did die; the United States then being in a state of war.”

That petitioner was brought to trial on July 30, 1946, on the above charges. That your petitioner through his counsel duly entered a plea in bar of

trial on the ground that the accused had once been acquitted of assault with intent to commit murder by a duly constituted court. That the previous acquittal involved the same person named in the specifications for which the accused was tried; namely, Lieutenant (junior grade) Roland F. Travis, U. S. Naval Reserve. It was alleged that the crime of assault with intent to commit murder was a lesser included offense of manslaughter and therefore an acquittal of the lesser crime is a bar to a subsequent prosecution for the greater crime. This plea in [6] bar was denied by the Naval General Court Martial and the trial of petitioner proceeded, resulting in a conviction of the charge of voluntary manslaughter and an acquittal of involuntary manslaughter.

## V.

That during the trial of the question of former jeopardy, the principle defense to the accused's plea in bar consisted of a written opinion by the Judge Advocate General of the Navy, which opinion usurped the prerogative of the trial court by stating that this present trial would not constitute former jeopardy. That said opinion of the Judge Advocate General was untimely in light of the fact that this high naval office is the ultimate reviewing authority of the trial court's proceedings and to dictate its opinion in a case prior to the accused having opportunity to present his argument to the trial court, was highly prejudicial to the interests of the accused and deprived him of his right of review.

## VI.

That petitioner was tried by General Court Martial, Twelfth Naval District, on July 30, 1946; that since said date of trial to the present date, namely, February 6, 1947, petitioner has been restricted to U. S. Naval Training and Distribution Center, Treasure Island, San Francisco, California. This period of time, approximately seven months, has been spent in waiting for the Navy Department to review the record of proceedings.

That the final decision of the Navy Department is to confirm the findings of the court, namely, findings of guilty to voluntary manslaughter and the sentence under which the petitioner is now serving is five years at hard labor.

## VII.

That the Naval General Court Martial had no jurisdiction over the crime of manslaughter for which the accused was tried and convicted because there had been an acquittal of a lesser included offense by a duly constituted Naval General Court Martial.

That the proceedings, finding and sentence of the court in its second trial of the accused are void. [7]

That the reviewing authority of the Navy was without a right to issue an opinion on this case prior to its trial.

Wherefore, your petitioner prays that a writ of habeas corpus issue, that a return date be set; that

your petitioner be restored to his liberty and the status of an officer of the United States Navy.

Respectively submitted,

EDWIN S. WILSON,

Attorney for Petitioner. [8]

State of California,

City and County of San Francisco—ss.

Edwin S. Wilson, being first duly sworn, deposes and says:

That he is an attorney at law, duly licensed to practice in the United States Federal Courts; that he is one of the attorneys for the petitioner in the foregoing petition; that he makes this verification on behalf of said petitioner for the reason that petitioner is absent from the place where affiant has his office, to-wit, the City of San Francisco; that he has read said petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters he believes it to be true.

EDWIN S. WILSON.

Subscribed and sworn to before me this 6th day of February, 1946.

[Seal]

L. H. CONDON,

Notary Public in and for the City and County of San Francisco, State of California.

(Here follows memorandum of points and authorities.) [9]



[Title of District Court and Cause.]

ORDER TO SHOW CAUSE WHY WRIT OF  
HABEAS CORPUS SHOULD NOT ISSUE

Good cause appearing therefor and upon reading the verified petition on file herein, it is hereby ordered that Captain S. X. McInerney, Commanding Officer of United States Naval Receiving Station, Yerba Buena Island, San Francisco, California, and Rear Admiral D. B. Beary, United States Navy Commandant, 12th Naval District, San Francisco, California, or whomsoever is or are charged with the custody of Matthew Wrublewski, Ensign, U.S.N., appears before this court on the 24th day of February, 1947, at the hour of 10:00 o'clock a.m. of said day, or as soon thereafter as said matter can be heard, at the court room thereof of the undersigned in room 265, Post Office Building, 7th and Mission streets, San Francisco, California, to show cause why a writ of habeas corpus should not issue herein as prayed for,

It Is Hereby Further Ordered that a copy of this order be served upon said Captain S. X. McInerney and Rear Admiral D. B. Beary or whomsoever is or are charged with the custody of Matthew Wrublewski, Ensign, U.S.N., by leaving a copy with them, together with a copy of the petition herein, and that a copy [12] of said order and a copy of the

petition herein be served upon the United States District Attorney for this district forthwith.

Dated February 6th, 1947.

LOUIS E. GOODMAN,  
Judge.

[Endorsed]: Filed Feb. 6, 1947. [13]

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[Title of District Court and Cause.]

MOTION TO DISMISS PETITION FOR  
WRIT OF HABEAS CORPUS

Come now Captain S. X. McInerney, Commanding Officer of United States Naval Receiving Station, Yerba Buena Island, San Francisco, California, and Rear Admiral D. B. Beary, United States Navy Commandant, 12th Naval District, San Francisco, California, and move this Honorable Court to dismiss the petition for writ of habeas corpus for the reason that the said application fails to state a cause of action upon which relief can be granted.

Dated February 24, 1947.

FRANK J. HENNESSY,  
United States Attorney.

JOSEPH KARSH,  
Assistant U. S. Attorney,  
Attorneys for Respondents.

District Court of the United States, Northern  
District fo California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 2nd day of April, in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Louis E. Goodman, District Judge.

No. 26862-G Civil

In the Matter of

MATTHEW WRUBLEWSKI, Ensign, U.S.N.,  
on Petition for a Writ of Habeas Corpus.

ORDER DISMISSING PETITION FOR WRIT  
OF HABEAS CORPUS AND ORDER TO  
HOLD PETITIONER WITHIN THE JUR-  
ISDICTION OF THIS COURT PENDING  
APPEAL

This case came on regularly this day for hearing of respondent's motion to dismiss the petition for a writ of habeas corpus. Edwin Wilson, Esq., attorney for petitioner, and Joseph Karesh, Esq., Assistant U. S. Attorney, for respondent, were present. It Is Ordered that said petition be dismissed in accordance with the motion to dismiss, as will more fully appear in a written opinion this day filed. On motion of Mr. Wilson, petitioner's intention to take

an appeal is noted in the record and respondent is ordered to hold petitioner within the jurisdiction of this Court pending appeal herein. [35-a]

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[Title of District Court and Cause.]

### OPINION

Goodman, District Judge.

Petitioner, an officer of the United States Navy, seeks by his petition for the writ of habeas corpus to be released from the custody of naval authorities who hold him at the United States Receiving Station, Yerba Buena Island, in this district, after his conviction on July 30, 1946, by a court martial of the crime of voluntary manslaughter and subsequent sentence to five years imprisonment. [36] The court issued an order directing the commanding officers of the Receiving Station to show cause why the writ should not issue. Respondents then moved to dismiss the petition. After argument and the filing of briefs, the motion has been submitted for decision.

It appears from the petition that petitioner, on December 11, 1944, was tried before a Naval General Court Martial at Pearl Harbor, Hawaii, for two offenses, to-wit: The crime of murder alleged to have been committed on or about August 7, 1944, at the U. S. Naval Air Station, Oahu, Hawaii, and the crime of assault with intent to commit murder alleged to have been committed at the same time and place upon the same victim. The Naval Court

adjudged petitioner guilty of murder and not guilty of the charge of assault with intent to commit murder.

Upon review of the judgment, the Judge Advocate General, on Nov. 9, 1945, declared the judgment and sentence for the crime of murder illegal, in that the same was committed "within the territorial jurisdiction of the United States" and thus beyond the jurisdiction of that court martial.\* Petitioner was not, however, released from custody. On July 30, 1946, petitioner was brought to trial before another Naval General Court Martial upon two charges, to-wit, voluntary manslaughter and involuntary manslaughter. Both charges specified the same homicide for which petitioner was tried in the 1944 court martial. Conviction of the charge of voluntary manslaughter and sentence to five years imprisonment followed.

At his trial on the manslaughter charges, petitioner pleaded "former jeopardy," in that he had previously (in 1944) been acquitted of the crime of assault with intent to [37] commit murder upon the same victim. In support of this plea, petitioner alleged that the crime of assault with intent to commit murder was a lesser included offense of the crime of manslaughter and that acquittal of the former barred subsequent prosecution for the

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\*Naval Courts Martial have jurisdiction of the crime of murder only when committed outside the territorial jurisdiction of the U.A. 34 USC s 1200 Art. 6.

greater offense. The court martial overruled the plea and the judgment was later confirmed by the Judge Advocate General.

Because of the alleged "former jeopardy," (Const. Amdt. V.) petitioner claims the Navy court, in the 1946 trial, was without jurisdiction and hence the writ should issue.

Unless it appears that the Navy court lacked jurisdiction, this court may not review its judgment. *U. S. v. Grimley*, 137 U. S. 147; *Swaim v. U. S.* 165 U. S. 553; *Mullan v. U. S.* 212 U. S. 516; *Ex parte Mason*, 105 U. S. 696; *Ex parte Reed*, 100 U. S. 13; *Carter v. McClaughry*, 183 U. S. 365. To resolve the jurisdictional issue, it is not necessary to decide whether a court martial conviction of the crime of manslaughter, where there has been a previous trial of the crime of assault with intent to commit murder, amounts to double jeopardy. This is for the reason that the specific guarantees of the 5th amendment to the Constitution relating to criminal prosecutions may not be invoked in "cases arising in the land or naval forces" of the United States. *Ex parte Quirin*, 317 U. S. 43; *Ex parte Milligan*, 71 U. S. 2, 123; *U. S. ex rel Innes v. Crystal* (2 Cir.) 131 Fed. (2d) 576; *Ex parte Benton*, 63 Fed. Supp. 808. The Naval court's decision denying the plea of double jeopardy may have been erroneous. But such errors of law by courts martial are not of themselves reviewable or correctible in the civil courts. They may be reviewed here only if they are of such a nature as to amount to a breach of the

“basic doctrine of fairness” under the due process clause of the [38] Constitution and thusoust the Naval court of jurisdiction. *U. S. v. Hiatt* (3 Cir.) 141 Fed. (2d) 664; *Ex parte Benton*, *supra*. And “to those in the military or naval services of the United States, the military law is due process.” *Reaves v. Ainsworth*, 219 U. S. 304. (Emphasis supplied). The question, therefore, is: Was the treatment given petitioner by the Navy court so “unfair” as to constitute lack of due process under military law?

Petitioner was represented by counsel during both courts martial. No claim is made of any unfairness in the conduct of his trials. It is not claimed that he was denied the right to produce witnesses or to cross examine witnesses. Nor is any conduct of the court itself complained of. The contentions made here were urged, both at his second court martial and upon review by the Judge Advocate General. They were determined adversely to him. Under military law, the decisions may have been wrong. But we may correct them here, only if the errors amount to a denial of due process.

It is a reasonable inference, as it would be in the civil courts, that the charge of assault with intent to commit murder was added to the charge of murder at the first court martial in order to provide for the exigencies of proof. Obviously acquittal of the assault charge was in the nature of a dismissal of that charge, because of the finding of guilt of murder. The entire record of petitioner’s case

negatives the assumption that he may have been acquitted of assault with intent to commit murder due to a lack of the required degree of proof to establish the commission by him of any assault upon the deceased at all, or of an intent to kill. Indulgence in this assumption would require complete disregard of the fact that the court martial believed and found him guilty of the greater crime of [39] murder.

Nothing in the record presented by the petition indicates a violation of the basic doctrine of fairness. It is true that much fumbling and delay by the Naval authorities is disclosed. At least, from the civil viewpoint, it may be so characterized. But I may not issue the writ for such reasons. In fact, nothing about this case bestirs any judicial urge to invoke the great writ of habeas corpus. Moreover, it may not be amiss to point out that the plight of petitioner, under all the circumstances, is not too unfortunate. Indeed he may have been more severely dealt with in the first instance had not the Naval authorities made the jurisdictional mistake of charging him with murder.

My conclusion is that the showing made fails to demonstrate a breach of the broad and basic doctrine of fairness under the due process clause.

The motion to dismiss the petition for a writ of habeas corpus is granted and the petition is dismissed.

Dated April 1, 1947.

[Endorsed]: Filed April 2, 1947. [40]



In the United States District Court for the Northern  
District of California, Southern Division

No. 26862-G

In the Matter of

MATTHEW WRUBLEWSKI, Ensign, U.S.N.,  
Petitioner.

Notice Is Hereby Given That Matthew Wrublewski, the petitioner above-named, does hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the opinion made and entered against him in this action on the 1st day of April, 1947, and from each and every part thereof.

EDWIN S. WILSON,  
Attorney for Petitioner.

[Endorsed]: Filed April 15, 1947. [41]

In the United States District Court for the Northern  
District of California, Southern Division

No. 26862-G

In the Matter of  
MATTHEW WRUBLEWSKI, Ensign, U.S.N.,  
Petitioner.

### DESIGNATION OF RECORD ON APPEAL

To the Clerk of the United States District Court for  
the Northern District of California, Southern  
Division:

It is respectively requested that the following be  
submitted to the Clerk of the United States Circuit  
Court of Appeals for the Ninth Circuit:

1. Petition for Writ of Habeas Corpus filed  
February 6, 1947.
2. Order to Show Cause Why Writ of Habeas  
Corpus Should Not Issue.
3. Petitioner's Memorandum of Points and  
Authorities.
4. Supplementary Memorandum of Points and  
Authorities.
5. Respondent's Memorandum to Dismiss Peti-  
tion for Writ of Habeas Corpus.
6. Respondent's Supplementary Memorandum.
7. Respondent's Amendments to Original Mem-  
orandum.

8. Petitioner's Memorandum in Answer to Respondent's Supplementary Memorandum.

EDWIN S. WILSON,

J. W. ERHLICH,

Attorneys for Petitioner.

[Endorsed]: Filed May 12, 1947. [42]

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In the Southern Division of the United States  
District Court for the Northern District of  
California

No. 26862-G

In the Matter of

MATTHEW WRUBLEWSKI, U. S. N.,

Petitioner.

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the defendant and Appellant herein may have to and including July 3, 1947, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated May 23, 1947.

LOUIS E. GOODMAN,

United States District Judge.

[Endorsed]: Filed May 23, 1947. [43]

District Court of the United States  
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 44 pages, numbered from 1 to 44, inclusive, contain a full, true and correct transcript of the records and proceedings in the Matter of Matthew Wrublewski, on Petition for Writ of Habeas Corpus No. 26862-G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$4.70 and that the said amount has been paid to me by the attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 1st day of July, A.D. 1947.

[Seal]

C. W. CALBREATH,  
Clerk.

M. E. VAN BUREN,  
Deputy Clerk. [44]

[Endorsed]: No. 11682. United States Circuit Court of Appeals for the Ninth Circuit. Matthew Wrublewski, Appellant, vs. Captain S. N. McInerney, Commanding Officer of United States Naval Receiving Station, Yerba Buena Island, San Francisco, California, and Rear Admiral D. B. Beary, United States Navy Commandant, 12th Naval District, San Francisco, California, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed July 9, 1947.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

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In the United States Circuit Court of Appeals  
For the Ninth Circuit

No. 11682

MATTHEW WRUBLEWSKI, Ensign, U.S.N.,  
Appellant,

vs.

UNITED STATES OF AMERICA,  
Respondent.

DESIGNATION OF POINTS RELIED ON BY  
APPELLANT ON APPEAL

Comes now Matthew Wrublewski, the appellant  
in the above entitled matter, through his attorneys,

J. W. Ehrlich and Edwin S. Wilson, and designates and states that he adopts as his points to be relied on on appeal as follows:

1. That the Writ of Habeas Corpus should have been granted and appellant, Matthew Wrublewski, discharged from custody and confinement at the U. S. Naval Disciplinary Barracks, Yerba Buena, San Francisco, California.

2. That the Court had jurisdiction to issue the writ of Habeas Corpus as prayed for in the petition on file herein.

3. That the type of errors committed by the Naval General Court Martial in its second trial of appellant are the type of errors which may be corrected by the Court.

4. That the guarantees of the Fifth Amendment to the Constitution may be invoked in cases concerning members of the U. S. Navy.

5. That where there has admittedly been error committed by a Naval General Court Martial in permitting a citizen of the United States to be tried twice for the same offense, or lesser included offenses therein, our Federal Courts have jurisdiction to correct such errors.

6. That appellant made claim of misconduct on the part of General Court Martial in his petition on file herein and that said claim of misconduct on the part of the Naval Court was by-passed by the United States District Court; to-wit: It was complained of by appellant that the Naval Court erred

in considering a certain letter from the Judge Advocate General's office, in which the latter issued its decision on the question of double jeopardy before the Court was given an opportunity to consider this important fact; that such conduct on the part of the Judge Advocate General in issuing a statement to the Court biased its judgment and such subsequent action on the part of the Naval Court amounted to unfairness to the accused.

7. That Naval Military Court is without jurisdiction over a crime of which an accused has once been acquitted.

8. That where a Naval General Court is admittedly without jurisdiction of an offense, i.e., murder within the continental limits of the United States, any proceeding of such a court in its trial of such an offense is a nullity and cannot be considered by a second Naval Court Martial or any Court in guessing at what the first Naval Court Martial would have done had it not been in error trying the accused for murder, a charge over which that court had no jurisdiction.

9. That in a trial of two separate charges, one of which the court lacks jurisdiction to hear, such failure of jurisdiction will not invalidate its findings from that charge over which it does have jurisdiction and that the findings on any charge over which the duly constituted Court has jurisdiction cannot later be discarded on the excuse that if the Court had had jurisdiction over the second charge, the result would not have been the same in its find-

ings on the charge over which it did have jurisdiction.

10. That the crime of assault with intent to commit murder is a lesser included offense of manslaughter.

11. That an acquittal of the crime of assault with intent to commit murder will preclude a subsequent trial involving the same victim and set of facts on a trial for manslaughter; that one found innocent as evidenced by an acquittal of an assault cannot later be tried for a homicide resulting from that same assault.

12. That the Navy Department, contrary to said Articles of War, governing the Army and Navy, recognizes the guarantees of the Fifth Amendment to the Constitution and, therefore, the personnel of the U. S. Navy may avail themselves of those guarantees.

J. W. EHRLICH,  
EDWIN S. WILSON,  
Attorneys for Appellant.

Receipt of a copy of the foregoing designation of points relied on by appellant on appeal is hereby acknowledged this 17th day of July, 1947.

FRANK J. HENNESSY,  
United States Attorney.

Per T. S.



In the United States Circuit Court of Appeals  
For the Ninth District

No. 11682

MATTHEW WRUBLEWSKI, Ensign, U.S.N.,  
Appellant,

vs.

UNITED STATES OF AMERICA,  
Respondent.

APPELLANT'S DESIGNATION OF PARTS  
OF THE RECORD ON APPEAL THAT IS  
TO BE PRINTED

Comes now Matthew Wrublewski, the appellant in the above-entitled matter, through his attorneys, J. W. Ehrlich and Edwin S. Wilson, Esqs., pursuant to rule 19, paragraph 6, of the rules of this court designates the part of the record on appeal to be printed as follows:

The entire record.

J. W. EHRLICH,  
EDWIN S. WILSON,  
Attorneys for Appellant.

Receipt of a copy of the foregoing Appellant's Designation of Parts of the Record on Appeal that is to be Printed is hereby acknowledged this 17th day of July, 1947.

FRANK J. HENNESSY,  
U. S. Attorney.

Per T.S.



No. 11,682

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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MATTHEW WRUBLEWSKI,

*Appellant,*

VS.

CAPTAIN S. X. MCINERNEY, Command-  
ing Officer of United States Naval  
Receiving Station, Yerba Buena  
Island, San Francisco, California,  
and REAR ADMIRAL D. B. BEARY,  
United States Navy, Commandant  
12th Naval District, San Francisco,  
California,

*Appellee.*

Upon Appeal from the District Court of the United States for  
the Northern District of California, Southern Division.

OPENING BRIEF FOR APPELLANT.

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FILED

OCT 3 1947

PAUL P. O'BRIEN,  
CLERK

EDWIN S. WILSON,

512 De Young Building, San Francisco.

*Attorney for Appellant.*



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No. 11682

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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MATTHEW WRUBLEWSKI,

*Appellant,*

VS.

CAPTAIN S. X. MCINERNEY, Command-  
ing Officer of United States Naval  
Receiving Station, Yerba Buena  
Island, San Francisco, California,  
and REAR ADMIRAL D. B. BEARY,  
United States Navy, Commandant  
12th Naval District, San Francisco,  
California,

*Appellee.*

Upon Appeal from the District Court of the United States for  
the Northern District of California, Southern Division.

## OPENING BRIEF FOR APPELLANT.

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### STATEMENT OF FACTS.

A detailed statement of the facts leading up to the filing of the petition for writ of habeas corpus is found in the transcript of record, pages 2-12. Briefly, those facts may be summarized as follows: On December 11, 1944, appellant was tried by a duly constituted

Naval General Court Martial at Pearl Harbor, Territory of Hawaii, on two charges: 1, *murder*; one specification thereunder alleging murder of one Lieutenant Roland S. Travis; 2, *assault with intent to commit murder*; with three specifications thereunder, the first specification of which alleges that appellant did assault with the intent to murder one Lieutenant Roland S. Travis. These charges are found in the transcript of record, pages 3, 4, and 5. This first Naval General Court Martial convicted appellant of the first charge, namely, murder, and acquitted appellant of the second charge, namely, assault with intent to commit murder, and each of the specifications thereunder were found not proved. Appellant was acquitted of all charges except the first one of murder. The Judge Advocate General's office in Washington, in reviewing the proceedings, recognized the fact that the Naval General Court Martial did not have jurisdiction over the charge of murder, as said alleged murder did not take place "without the continental limits of the United States". Therefore, said conviction was void and the proceedings as to this charge alone was a nullity.

Despite this realization that appellant stood convicted of nothing, appellant was nevertheless confined in a prisoner status until July 30, 1946, at which time he was brought to trial a second time before a Naval General Court Martial on charges of: 1, voluntary manslaughter, and 2, involuntary manslaughter, both alleging a homicide of Lieutenant Roland S. Travis, which specifications are found on pages 8 and

9 of the Transcript of Record. This second trial was opposed by appellant in that he duly entered a plea in bar of trial establishing that he had previously been acquitted of assault with intent to commit murder by a court of competent jurisdiction, a lesser included offense of manslaughter; that such acquittal was a bar to any subsequent trial of any greater offense, which includes the offense of assault. This plea in bar was denied and the trial resulted in conviction of appellant of the crime of voluntary manslaughter and he was eventually sentenced to serve five years at hard labor. It was following this conviction and sentence as approved by the U. S. Navy Department in Washington, D. C., that appellant sought relief in the District Court of the United States, Northern District of California, Southern Division. Appellant filed his petition for writ of habeas corpus in the District Court contending that in the first trial by a competent Naval General Court Martial at Pearl Harbor, that court, although lacking jurisdiction over the crime of murder, nevertheless had jurisdiction over the second charge of assault with intent to commit murder, of which charge appellant was acquitted and therefore the invalidity of proceedings as to the first charge did not affect the validity of the court's findings in the second charge. It was contended that the Fifth Amendment to the Constitution; namely that portion which states "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb", applied to the appellant. It is alleged that the Navy Department ignored this constitutional right of

appellant and therefore this question was one for consideration of the District Court. After filing of briefs and arguments, the District Court issued an order dismissing petition for writ of habeas corpus. Appellant now seeks an interpretation of the above-quoted clause of the Federal Constitution.

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### **ASSIGNMENT OF ERRORS.**

The opinion of the District Court is found in the transcript of record, pages 16-20. The statement of facts found on pages 16 and 17 are not disputed by appellant. However, objection is raised to the following statements contained in the court's opinion:

1. "To resolve the jurisdictional issue, it is not necessary to decide whether a court martial conviction of the crime of manslaughter, where there has been a previous trial of the crime of assault to commit murder, amounts to double jeopardy. This is for the reason that the specific guaranties of the Fifth Amendment to the Constitution relating to criminal prosecution may not be invoked in 'cases arising in the land or naval forces of the United States' ". It will be contended in appellant's argument and supported by authorities that the portion of the Fifth Amendment to the Constitution relating to "double jeopardy" may be invoked in cases arising in the naval forces of the United States.

2. "The Naval Court's decision denying the plea of double jeopardy may have been erroneous. But,

such errors of law by court martials are not of themselves reviewable or correctible in the civil court.”

3. The language of the District Court is contradictory in stating (a) “they (errors of general court) may be reviewed here only if they are of such a nature to amount to a breach of the basic doctrine of fairness under the due process clause of the Constitution and thus oust the naval court of jurisdiction” and (b) “and to those in the military services or naval services of the United States, the military law is due process”. This part of the opinion states that only under the due process laws of the Constitution may a Federal Court review errors of Naval Court and then it states that military law is due process to those in the services.

4. The opinion states “No claim is made of any unfairness in the conduct of his trial.” Reference is made to the transcript of record, page 10, paragraph 5, which is a specific objection to the fairness in the conduct of the second general court martial trial in that the Judge Advocate General of the Navy dictated the decision of the court in its ruling on the plea in bar prior to the presentation of evidence in the case.

5. The opinion reiterates its statement that “But we may correct them here only if the errors amount to a denial of due process”. This statement is found on page 19 of the transcript of record, on the same page on which it is stated by the court “The military law is due process”.

6. The matters presented to the District Court and the petition for writ of habeas corpus involves only a jurisdictional question and a question of law and it was error on the part of the court to indulge in the possible reasonings of the first General Court Martial in reaching a decision of "not guilty" on the assault with intent to commit murder charge. It was further error on the part of the court in failing to recognize that the conviction of the murder charge was an absolute nullity and deserving of no consideration whatsoever; that further, the only proceedings which were valid under the first General Court Martial trial was the acquittal of appellant on the charge of assault with intent to commit murder. The Court's reasoning in arriving at an acquittal is not a question for the Federal Court.

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### ARGUMENT.

#### Summary.

It is urged by appellant that he was tried by a court of competent jurisdiction on the charge of assault with intent to commit murder and was duly acquitted of this charge and three specifications thereunder. There was no question of the validity of that acquittal even though in the same trial, the trial court found him guilty of the charge of murder, which is a charge over which that court had no jurisdiction and therefore the proceedings as to that charge of murder alone were void, and the sentence a nullity. This jurisdictional mistake on the part of the Government in no way affected the validity of appellant's acquittal of

the charge of assault with intent to commit murder. It is urged by appellant that having been once acquitted of this charge, he could not thereafter be prosecuted for the same charge or any degree thereof.

“An acquittal or a conviction under an indictment for a crime consisting of different degrees is a bar to a prosecution for another degree, the finding of one degree being deemed to operate as an acquittal and bar to prosecution on the other degrees”.

*Grafton v. U. S.*, 206 U. S. 333, 51 L. Ed. 1084, 27 S. Ct. 749.

Following the acquittal of appellant of the charge of assault with intent to commit murder and at the outset of a second trial charging him with manslaughter of the same victim under the same circumstances and state of facts, a plea in bar was duly entered but was denied and a second trial resulted in conviction of appellant which is the Government's reason for holding him in custody at present. In holding appellant in custody by virtue of the sentence of the second trial appellant contends that this is in violation of that part of the Fifth Amendment to the Constitution which states “nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb”. U.S.C.A. Const. 5.

**The double jeopardy clause of the Fifth Amendment applies to Naval Personnel.**

The principal objection to the opinion of the District Court is the statement that the specific guaranties of the Fifth Amendment to the Constitution

relating to criminal prosecutions may not be invoked in “cases arising in the land or naval forces” of the United States. Before citing cases which show that a naval officer is entitled to derive benefit from that part of the Fifth Amendment to the Constitution relating to double jeopardy, it is desired to point out wherein the cases cited in the court’s opinion do not apply to the case at bar. *Ex parte Quirin*, 317 U.S. 43 and *Ex parte Milligan*, 71 U.S. 2, 123, cited in the court’s opinion are found on page 18 of the transcript of record. Both have to do with the exception which does not require a presentment or indictment of a Grand Jury. It is not questioned that one in the military service may be tried by the regular prescribed *procedure* of the military without a presentment or indictment of a Grand Jury. Therefore the holdings in *Ex parte Quirin* and *Ex parte Milligan* have no bearing on that portion of the amendment which pertains to double jeopardy. The other cases cited by the court in support of its contention that the Fifth Amendment relating to criminal prosecutions may not be invoked in cases arising in the land or naval forces; namely, *U. S. ex rel. Innes v. Crystal* (2 Cir.), 131 Fed. (2d) 576 and *Ex parte Benton*, 63 Fed. Supp. 808; relate to facts foreign to the question at bar. The case of *U. S. ex rel. Innes v. Crystal* (supra) as well as the case of *Ex parte Benton*, involved questions of whether or not the accused was properly represented by counsel, and whether the lack of competent counsel, if proved, would be a denial of due process. Appellant is in agreement with the holdings in the above cases as cited by the District Court, but



desires to point out that in none of those cases was the clause of the Fifth Amendment which is relied upon by appellant, discussed.

It is most necessary in this case to examine the Fifth Amendment to the Constitution and dwell on that clause which is applicable to the present facts. The facts in this case have to do with double jeopardy. The pertinent clause is “nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb”. As further evidence to the fact that it was intended by the framers of the amendment that each clause should be construed separately, attention is called to that clause which immediately follows the one relied upon by appellant, “nor shall be compelled in any criminal case to be a witness against himself \* \* \*”. Clearly, if in a Naval General Court Martial an accused were forced to be a witness against himself, this would be a violation of one part of the Fifth Amendment and relief should be granted by the Federal Courts. It cannot be said that a person on account of his military status may, in violation of the above-cited clause of the Constitution, be forced to testify against himself. It is conceded that the first part of the Fifth Amendment does make an exception to members of the military in stating “no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment by a Grand Jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger”. This is a complete statement and the exception noted applies only to that

which is contained in that complete statement and does not apply to the separate guaranties which follow, among which is that guarantee against twice being prosecuted for the same offense. In this connection, appellant refers to the case of *U. S. v. Haitt* (3 Cir.), 141 Fed. (2d) 664, which is also cited in the District Court's opinion, page 19, and appellant respectfully calls the court's attention to the following language used in this case:

“We think that the basic guarantee of fairness afforded by the due process clause of the Fifth Amendment applies to a defendant in criminal proceedings in a Federal military court as well as in a Federal civil court. An individual does not cease to be a person within the protection of the Fifth Amendment to the Constitution because he has joined the nation's armed forces and has taken the oath to support that constitution with his life, if need be. The guarantee of the Fifth Amendment that ‘no person shall \* \* \* be deprived of life, liberty or property without due process of law’ makes no exceptions in the case of persons who are in the armed forces. *The fact that the framers of the Amendment did specifically except such persons from the guarantee of the right to a presentment or indictment by a Grand Jury which is contained in the earlier part of the Amendment makes it even clearer that persons in the armed forces were intended to have the benefit of the due process clause.*” (Emphasis supplied.)

If we may rely on the same cases as cited by the District Court, it becomes clear that only the first part of the Fifth Amendment, that having to do with pre-

sentment or indictment by a Grand Jury, affects members of the naval forces. If, according to this case, members of the armed service are entitled to due process of law, clearly they are also entitled to that guarantee against double jeopardy to which no exception is mentioned in the amendment itself. Citing this case further as to the question of whether or not habeas corpus proceedings are the proper remedy for violation of the Fifth Amendment, the court said, "We conclude that it is open for a civil court in a habeas corpus proceeding to consider whether the circumstances of a court martial proceeding and the manner in which it was conducted ran afoul of the basic standard of fairness which is involved in the constitutional concept of the due process of law, and if it so finds to declare that the relator has been deprived of his liberty in violation of the Fifth Amendment and to discharge him from custody." The court in the *Hiatt* case indulged in the question of whether or not the accused was deprived of his constitutional rights because the trial court conferred with the judge advocate not in the presence of the accused, and further, that the trial court postponed the deliberation on a verdict. Appellant is in agreement with the case as cited by the District Court in its opinion and urges that if the court in the *Hiatt* case had found a violation of the Fifth Amendment, the relator would have been discharged from custody by order of that Federal Court. Similarly, it is urged here that if the District Court found that appellant in fact had been acquitted of assault with intent to commit murder and

subsequently denied a plea in bar and was convicted on the second trial of manslaughter, which said charge includes assault, then that portion of the Constitution, “nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb” had been violated and the District Court was in error in stating that this particular guaranty of the Constitution was not applicable to cases arising in the naval forces.

In further support of applicant’s argument that the District Court erred in its statement that the guaranties of the Fifth Amendment do not apply to cases arising in the naval forces, appellant respectfully submits the case of *Sanford v. Robbins*, 115 Fed. (2d) 435 (5 Cir.), 1940. This case is believed to answer the question of whether or not a Federal Court may review a question involving double jeopardy in a naval military court and the opinion states without equivocation that the navy, contrary to the army, recognizes that the members of its forces shall not be deprived of that portion of the Fifth Amendment relating to double jeopardy. In this case the accused was tried and sentenced to life imprisonment by a naval general court martial. The President of the United States gave the accused a new trial due to certain irregularities in the first trial. This administrative action was for the benefit of the accused and in no way under this particular circumstance could be considered as an acquittal, the court saying that in light of such consideration of the accused’s rights it could be assumed that the accused would ask for a new trial and accept one if granted, as he could be in no worse posi-

tion as the result of a new trial. The court said "we have no doubt that the provision of the Fifth Amendment 'nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb' is applicable to courts martial. The immediately preceding exception of 'cases arising in the land or naval forces' from the requirement of an indictment abundantly shows that such cases were in contemplation but not excepted from the other provisions."

In the case of *Ex parte Costello*, 8 Fed. (2d) 386, the accused was tried and convicted by a Naval General Court Martial, then requested a new trial of the Secretary of the Navy which was granted. At the second trial, the accused argued that the setting aside of the first proceedings and granting a new trial was tantamount to an acquittal and therefore he could not be tried again. The trial court erroneously sustained his plea in bar, which action was disapproved by the judge advocate general, and the accused again ordered to trial. The Federal Court in this case did not deny that the guaranties of the Fifth Amendment were available to relator, but quite the contrary, the court examined the facts in order to determine whether or not there had been double jeopardy. The court's examination of these facts recognized the constitutional rights of the accused contrary to the opinion of the District Court in the instant case. The court said "The single question for determination is the effect of the disapproval of the sentence and the order thereon by the Secretary of the Navy". The court held that the appearance of the accused in entering a

plea in bar did not place him in jeopardy. "This appearance was not a trial putting him in jeopardy so as to require his release from custody on writ of habeas corpus." From this language it may be inferred that if the second trial had progressed as far as an arraignment and the reviewing authorities disapproved of the proceedings of its own volition, not by request of the accused, this would be jeopardy and would bar a subsequent trial. It may also be inferred that "his release from custody on writ of habeas corpus" would be appropriate. In recognizing the specific guaranty of the Fifth Amendment relating to double jeopardy, the court in the *Costello* case said "The 102nd Article of War (Comp. St. 2308A) provides that no person shall be tried a second time for the same offense. Section 649 of 'Naval Courts and Boards' (now section 408) issued by the Navy Department and approved by the President for the government of persons attached to the naval service which seeks to carry out this provision of the Articles of War reads as follows 'The Fifth Amendment to the Constitution of the United States provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb". This provision is the authority for the principle that no person shall be tried a second time for the same offense' ".

The case of *Ex parte Quirin* (supra) which is cited by the District Court in its opinion considers the question of whether or not an enemy of the government may be tried by a military commission and not afforded the guaranty of a presentment or indictment

by a Grand Jury. It holds that such persons are not afforded this specific guaranty but the entire case makes no reference whatsoever to that provision of the Fifth Amendment relating to double jeopardy. It refers specifically to the first provision as follows: "The exception of cases arising in the land or naval forces from the operation of the *provision* of the Fifth Amendment that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury applies to offenders against the law of war". It is contended that this case is in no way pertinent to the present facts.

To further substantiate the contention that the guaranty against double jeopardy as set forth in the Fifth Amendment applies to naval personnel, court martial order 141-1918 P 18 states "so far as concerns the administration of justice in the navy the legal bar to a second trial for the same offense is founded upon the Fifth Amendment of the Constitution of the United States, which provides that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb'. There is no law expressly applying the benefit of this constitutional provision to persons tried by naval courts martial, but the Fifth Amendment applies to them of its own force without requiring expression in an Act of Congress". This court martial order cites *Grafton v. United States*, 206 U.S. 333. The court martial order further provides "with relation to persons subject to trial by army courts martial it is provided by article 40 of the

Articles of War (39 Stat. 657) that ‘no person shall be tried a second time for the same offense’. The article clearly defines the meaning of the constitutional provision, which, while its main purpose is to prevent a second punishment for the same offense, has been repeatedly construed to prohibit a second trial where the accused has been previously acquitted or convicted of the same offense except with his consent or at his own request. *Ex parte Lange*, 18 Wall. 163; *In re Nielsen*, 131 U.S. 176, 188; *Kepner v. U. S.*, 195 U.S. 100; 1 *Op. Atty Gen.* 233.” This court martial order clearly recognizes the distinction between double jeopardy arising in the military forces and double jeopardy arising in the naval forces. The members of the military service are protected by the Articles of War. The Fifth Amendment to the Constitution relates to members of the naval service. “Under the practice of both the army and navy it seems to be long settled that where the accused has once been convicted or acquitted he has been tried in the sense of the Articles of War and the Fifth Amendment to the Constitution”.

Habeas corpus is the proper remedy by which a member of the naval service may be released from custody when he has been tried and acquitted of a charge and is kept in custody following a second trial on the same issues. This was recognized in court martial order 8, 1929, pages 14 and 15.

On pages 18 and 19 of the Transcript of Record, the District Court in its opinion states “the naval court’s decision denying the plea of double jeopardy may have



been erroneous but such errors of law by courts martial are not of themselves reviewable or correctible in the civil courts. They may be reviewed here only if they are of such a nature as to amount to a breach of the basic doctrine of fairness under the due process clause of the Constitution and thus oust the naval court of jurisdiction." The District Court apparently recognizes that at least one guaranty under the Fifth Amendment to the Constitution is available to members of the U.S. Navy. The opinion does not refer to "cases arising in the land or naval forces" in concluding that *if* there is a showing of lack of due process by a breach of the basic doctrine of fairness then the Federal Court can apply the Fifth Amendment to the Constitution to cases in which due process of law is denied. In other words, the court concedes that the due process clause of the Constitution is not excepted from cases arising in land or naval forces as is the first clause of that amendment pertaining to indictment of a Grand Jury. Why then would not other parts of the Fifth Amendment apply to naval personnel unless excepted?

The language of the opinion of the court, page 19, states that only under the due process clause of the Constitution could relief be sought in the civil court and that "the military law is due process" which leaves us with not even a hypothetical case reviewable by the civil court. If the civil court can only attack the action of a naval court for violation of due process and "military law is due process" then military law stands alone and no civil court could interfere

with any of its actions despite any violations of other provisions of the Fifth Amendment. For example, the property of a sailor could be taken without due process of law or his life may be taken without a trial as “military law is due process” and would not, according to the opinion, be subject to any supervision of the Federal Courts. Likewise, a sailor who may be forced to testify against himself and convicted on such testimony would have no recourse to the civil courts by way of the great writ of habeas corpus.

The case of *Reaves v. Ainsworth*, 219 U.S. 304 as cited on page 19 of the Transcript of Record in the District Court’s opinion, had to do with the question of the findings of a board of medical examiners, determining the rights of an army officer. In so far as the constitutional guaranty against double jeopardy is concerned, this case does not appear to be in point. It does not raise the question of whether a naval officer is entitled to that specific guaranty of the Constitution against double jeopardy. It is more of a discussion of the procedure of retiring army officers on medical discharges.

The case of *Ex parte Benton*, 63 Fed. Supp. 808, was a case involving the qualifications of a defense counsel in a general court martial trial, which, as the opinion stated, was little more than a criticism of counsel. Nowhere in the case is there found any reference to the question presented by the facts at hand. The *Benton* case did not pertain to double jeopardy or the specific guaranty against double jeopardy as provided for in the Fifth Amendment to

the Constitution. This and the *Reeves* case considered the question of fairness of the military whereas in the case at bar, reliance is solely upon the law, as we are not permitted to indulge in the reasoning for the first acquittal but must confine our arguments to the fact that there was an acquittal and a subsequent trial on the same facts, which it is contended, constitutes double jeopardy.

It is believed to be error on the part of the District Court to indulge in speculation as to how the first trial court reached its decision in acquitting the accused of the charge of assault to commit murder. It was further error on the part of the District Court to take into consideration a conviction of the murder charge. The conviction of the murder charge was an absolute nullity, deserving of no consideration for the reason that the naval court in Hawaii did not have jurisdiction over this particular crime as the alleged murder was committed within the territorial jurisdiction of the United States, 34 U.S.C. 1200, Art. 6. The naval trial court in Hawaii did have jurisdiction of the crime of assault with intent to commit murder. Its findings were final as the court acquitted the accused. This judicial act by a competent court cannot be ignored. The error on the part of the navy in erroneously preferring the charge of murder cannot nullify an acquittal of the accused on a charge over which it had jurisdiction. In the case of *Rosborough v. Rossell*, CMO 9, 1945, page 399, the United States Circuit Court of Appeals for the First Circuit on July 26, 1945, rendered an opinion which is believed to set

forth one of the principles involved in the present case. In the *Rosborough* case, the accused was tried on one single charge, that of murder. Under circumstances similar to appellant's case, it was held that the general court martial lacked jurisdiction over the charge and the court could not find the accused guilty of even a lesser included offense as there was no jurisdiction whatsoever to proceed to a trial on the single charge of murder. The court said, however, "Rosborough might have been brought to trial on a charge of murder and a specification thereunder and a separate charge of manslaughter and a specification thereunder. In such a case the court martial would have had no jurisdiction of the murder charge but that would not have rendered the proceedings wholly void since it would have had jurisdiction of the charge of manslaughter since a finding of guilty of manslaughter only and sentence therefor would have been valid." This is analogous to our case in that appellant was tried on two charges, (1) murder, over which the court had no jurisdiction, and therefore proceedings as to this charge were void, and (2), assault with intent to commit murder of the same victim, of which charge he was acquitted. This acquittal, it is urged, is a bar to any subsequent trial of this offense or any included or greater offenses. Were this not so, appellant could have been tried a second time, not only for manslaughter of Lieutenant Travis, but tried for assault or assault with a deadly weapon of the two other officers named in the two other specifications under the assault with intent to commit

murder charge. These specifications are found on pages 4 and 5 of the Transcript of Record. It was not contended by the Navy Department that appellant should be tried a second time for assault against Lieutenant Robert M. Nason and Lieutenant Joseph A. Osborn, although the evidence adduced at the first trial was necessarily the same as adduced at the second trial. Obviously the Navy Department recognized appellant's acquittal of these two specifications under the assault charge but by insisting upon a second trial for manslaughter has failed to recognize the acquittal of the assault alleged in the first specification.

The District Court's opinion beginning on page 19 states "The entire record of petitioner's case negatives the assumption that he may have been acquitted of assault with intent to commit murder due to a lack of the required degree of proof to establish the commission by him of any assault upon the deceased at all or of an intent to kill. Indulgence in this assumption would require complete disregard of the fact that the court martial believed and found him guilty of the greater crime of murder". It is contended that the Federal Court may look at the trial court's decision only and not speculate on how the court reached its decision. In this case there was an acquittal of assault with intent to commit murder. It is not disputed that the court was one of competent jurisdiction, had jurisdiction of the person and the charge. Therefore its decision—acquittal—cannot be questioned. It is not disputed that the same court had absolutely no

jurisdiction over the greater crime of murder. It is further not disputed that any finding on this charge is a nullity and it is beyond the scope of inquiry by any court to condone such an error in preferring this charge by then permitting the Navy to try the accused on a more appropriate charge despite the final act of acquittal in the previous proceedings. The Federal Court case of *Grafton v. The United States* (supra) in considering whether or not the double jeopardy clause of the Fifth Amendment to the Constitution applied to “cases arising in the land or naval forces”, did not question Grafton’s right to have the Federal Court determine the question of double jeopardy. In this case Grafton was acquitted by a Military Court Martial, then tried by the Philippine Civil Court for the same offense. The Federal Court held that Grafton had once been in jeopardy when tried by the Military Court Martial, was acquitted and could not be tried by the Philippine Court. The act of Grafton was an offense against one Government, the United States Government, and since both the military court and the Philippine court derived their authority from the United States Government there was but one offense and that against the same Government. Similarly, in the case at bar there were two trials both by military courts. There is no question of the alleged act being an offense against both the Navy and State Government. The *Grafton* case recognized the constitutional guaranty against double jeopardy to members of the Military.

## UNFAIRNESS IN CONDUCT OF SECOND TRIAL.

As a separate and distinct argument of appellant, reference must be made to page 19 of the Transcript of Record in which the opinion of the District Court states "No claim is made of any unfairness in the conduct of his trials". Attention is respectfully called to page 10 of the Transcript of Record, paragraph five of the petition for writ of habeas corpus. In said paragraph of the petition it was complained that the Judge Advocate General of the Navy issued an opinion determining for itself the question of former jeopardy and this opinion which ruled that to try appellant a second time would not be double jeopardy, was an unfair way of dictating to the trial court its decision before evidence could be adduced. That such a written opinion was introduced into evidence at the second trial of the appellant has not been denied by the appellee. It was obvious that the Navy Department in Washington had a very complex situation in appellant's record of his trial at Hawaii. There was a conviction which was void. There was an acquittal which was valid. With this situation and particularly in light of the fact that at the time of the second trial, appellant had been imprisoned since August 7, 1944 without a valid conviction, the Judge Advocate General issued an opinion that it would be legal and proper to try appellant a second time for manslaughter. This opinion emanated from Washington only after appellant had sought relief in the Federal Court and the Navy Department had to show cause why appellant was still incarcerated, having had no

valid trial other than that which resulted in an acquittal.

The trial court at the second trial, in light of the written opinion from Washington, would certainly not take the initiative to consider the facts and render a decision contrary to their superior officer. This procedure shocks the sense of the basic doctrine of fairness and even under the conclusion reached by the District Court, such procedure in military law amounts to a denial of due process.

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**ACQUITTAL OF ASSAULT CHARGE BAR TO PROSECUTION  
FOR MANSLAUGHTER.**

As to the question of whether an acquittal of the charge of assault with intent to commit murder will operate as a bar to a subsequent trial of manslaughter, the authorities are clear that manslaughter includes an assault and if not guilty of the assault then the accused cannot be guilty of a homicide as a result of said assault. The leading Supreme Court case of *Grafton v. United States* (supra) states "if not guilty of the lesser crime the accused could not for the same acts be guilty of the offense of higher grade. \* \* \* The Government cannot legally for the same transaction put a person in jeopardy for the second time by simply calling the offense another name. \* \* \* Does the result of the first prosecution negative the facts charged in the second? If so, double jeopardy lies". In this case we have to look at the *result* of the first prosecution. That result simply is an acquittal of



assault with intent to commit murder. This does negative the facts charged in the second trial for manslaughter. Again we look at the results of the trial for murder and find a nullity.

Section 119, Naval Courts and Boards, clearly states that the crime of assault is a lesser included offense of manslaughter.

Using the evidence test referred to in the *Graviers* case (*Graviers v. United States*, 220 U.S. 338), "The evidence required to support conviction upon one of them would have been sufficient to warrant a conviction upon the other". In considering evidence necessary to convict appellant of voluntary manslaughter and in proving the words of the specification under that charge of manslaughter, it becomes apparent that in proving such a charge it is necessary to at least prove that appellant assaulted deceased Travis with the 38 calibre pistol. The court's attention is respectfully called to the words of the two specifications as set forth in the petition. Further the trial court having found there was no assault by appellant with a gun or anything else, then using this evidence test to determine double jeopardy, we cannot again try appellant under the manslaughter charge which will require a finding by the court that appellant did commit some of the acts of which he was previously acquitted.

In the case of *In re Nielsen*, 131 U.S. 176, the court states that

"Whereas in this case a person has been tried and convicted for a crime which has various incidents

included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense”.

Appellant claims that the “incident” common to both charges for which he was tried is assault.

Quoting from the case of *Tritico v. U. S.*, 4 F. (2d) 664, in which the court uses Mr. Bishop’s test of double jeopardy,

“The test of what is the same offense is stated to be ‘whether if what is set out in the second indictment had been proved under the first there could have been a conviction; when there could, the second cannot be maintained; when there could not, it can be’ ”.

Appellant alleges that the evidence necessary to convict on manslaughter if brought out in the previous trial for an aggravated assault which caused this homicide would necessarily have been sufficient to convict the accused of assault and therefore applying Mr. Bishop’s test to the facts, the second prosecution for manslaughter should not have been maintained.

In court martial order 2, 1928, page 20, accused was tried for manslaughter and acquitted. It is most interesting to note the language used by the Judge Advocate General dealing with lesser included offenses of which the trial court should have found the accused guilty, to-wit: “But even had the evidence supported the court’s finding that the accused was not guilty of voluntary manslaughter, for example that death resulted from some intervening cause and not

directly arising as a result of the accused's act of striking the deceased, and the evidence is uncontroverted that he was struck by the accused, *the court still possessed ample authority which it did not exercise to find the specification proved in part, that is, of finding that the accused willfully and without justifiable cause struck another person in the navy, and the accused guilty in a less degree than charged*, since mere words will not justify an assault or the act of striking another." Of course the accused in the above case having been acquitted of manslaughter was not again tried for assault or striking as it failed to find him guilty of these elements of manslaughter in the first trial, this acquittal amounting to a bar to further prosecution for these acts.

Citing Naval Courts and Boards, Sections 408-410:

"When a person has been once convicted or acquitted by a court of a certain offense, he is not subject to trial subsequently for a minor offense included therein. Likewise when once tried for a minor offense an accused cannot later be tried for a major offense of which it is a part, because to do so would be to place him twice in jeopardy for the minor offense."

A simple assault is a lesser included offense of an aggravated assault, "assault with intent to commit murder". An assault is a lesser included offense of manslaughter whether voluntary or involuntary. This is set forth in Section 119, Naval Courts and Boards.

Quoting from the leading case of *Grafton v. United States* (supra):

“It is not in all cases necessary that the two charges should be precisely the same in point of degree for it is sufficient if an acquittal of one will show that the defendant could not have been guilty of the other. Thus a general acquittal of murder is a discharge of an indictment of manslaughter upon the same person because the latter charge was included in the former and if it had so appeared on the trial the defendant might have been convicted of the inferior offense an acquittal of manslaughter will preclude a further prosecution for murder, for if he were innocent of the modified crime he could not be guilty of the same fact with addition of malice and design.”

In the case of *Doggert v. State*, 93 S.W. 399, it was pointed out:

“When a person has been convicted or acquitted the state cannot upon the same evidence again convict him for the same act even though the crime is designated by another name.”

The court in *State v. Hoot*, 120 Iowa 238, said:

“It must be conceded that a charge of assault with intent to commit murder includes an assault with intent to commit manslaughter, an assault with intent to do great bodily harm, and also a simple assault.”

In 26 *American Jurisprudence* 279, it was said:

“It is rather difficult to conceive of a prosecution for homicide resulting from an assault where the defendant has been found innocent of committing the assault.”

**CONCLUSION.**

From the foregoing, it is respectfully submitted that: (1) The District Court of the United States for the Northern District of California, Southern Division, erred in concluding that the civil court could not enforce appellant's constitutional right of protection afforded him by that provision of the Fifth Amendment to the Constitution, to-wit: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb". (2) That the facts of this case show a valid acquittal of appellant on a charge of assault with intent to commit murder and that this acquittal by a court of competent jurisdiction precludes any second prosecution for the same offense or any offense of which the previous charge was a part. That the United States Navy erred in prosecuting appellant a second time under these circumstances and that therefore the sentence under which appellant is now being held in custody is void for lack of jurisdiction.

Therefore, it is prayed that this Honorable Court reverse the opinion of the District Court and order the release of appellant from custody.

Dated, San Francisco,

October 2, 1947.

Respectfully submitted,

EDWIN S. WILSON,

*Attorney for Appellant.*



No. 11,682

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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MATTHEW WRUBLEWSKI,

*Appellant,*

vs.

CAPTAIN S. X. McINERNEY, Command-  
ing Officer of United States Naval  
Receiving Station, Yerba Buena  
Island, San Francisco, California,  
and REAR ADMIRAL D. B. BEARY,  
United States Navy, Commandant  
12th Naval District, San Francisco,  
California,

*Appellees.*

BRIEF FOR APPELLEES.

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Post Office Building, San Francisco,

*Attorneys for Appellees.*

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No. 11,682

IN THE  
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**For the Ninth Circuit**

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MATTHEW WRUBLEWSKI,

*Appellant,*

VS.

CAPTAIN S. X. MCINERNEY, Command-  
ing Officer of United States Naval  
Receiving Station, Yerba Buena  
Island, San Francisco, California,  
and REAR ADMIRAL D. B. BEARY,  
United States Navy, Commandant  
12th Naval District, San Francisco,  
California,

*Appellees.*

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**BRIEF FOR APPELLEES.**

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**JURISDICTIONAL STATEMENT.**

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called the "Court below", dismissing petition for writ of habeas corpus. (Tr. 16-21.) The Court below had jurisdiction of the habeas corpus proceedings under Title 28 U.S.C.A., Sections

451, 452 and 453. Jurisdiction to review District Court's order dismissing the petition is conferred on this Court by Title 28 U.S.C.A., Sections 463 and 225.

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### **STATEMENT OF THE CASE.**

The facts of this case are, as set forth by the Court below in its order and opinion dismissing petition for writ of habeas corpus, which reads in part as follows:

“Petitioner, an officer of the United States Navy, seeks by his petition for the writ of habeas corpus to be released from the custody of naval authorities who hold him at the United States Receiving Station, Yerba Buena Island, in this district, after his conviction on July 30, 1946, by a court martial of the crime of voluntary manslaughter and subsequent sentence to five years imprisonment. The court issued an order directing the commanding officers of the Receiving Station to show cause why the writ should not issue. Respondents then moved to dismiss the petition. After argument and the filing of briefs, the motion has been submitted for decision.

It appears from the petition that petitioner, on December 11, 1944, was tried before a Naval General Court Martial at Pearl Harbor, Hawaii, for two offenses, to-wit: The crime of murder alleged to have been committed on or about August 7, 1944, at the U. S. Naval Air Station, Oahu, Hawaii, and the crime of assault with intent to commit murder alleged to have been committed at the same time and place upon the same victim. The Naval Court adjudged petitioner guilty of

murder and not guilty of the charge of assault with intent to commit murder.

Upon review of the judgment, the Judge Advocate General, on Nov. 9, 1945, declared the judgment and sentence for the crime of murder illegal, in that the same was committed 'within the territorial jurisdiction of the United States' and thus beyond the jurisdiction of that court martial.\* Petitioner was not, however, released from custody. On July 30, 1946, petitioner was brought to trial before another Naval General Court Martial upon two charges, to-wit, voluntary manslaughter and involuntary manslaughter. Both charges specified the same homicide for which petitioner was tried in the 1944 court martial. Conviction of the charge of voluntary manslaughter and sentence to five years imprisonment followed.

At his trial on the manslaughter charges, petitioner pleaded 'former jeopardy', in that he had previously (in 1944) been acquitted of the crime of assault with intent to commit murder upon the same victim. In support of this plea, petitioner alleged that the crime of assault with intent to commit murder was a lesser included offense of the crime of manslaughter and that acquittal of the former barred subsequent prosecution for the greater offense. The court martial overruled the plea and the judgment was later confirmed by the Judge Advocate General.

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\*Naval Courts Martial have jurisdiction of the crime of murder only when committed outside the territorial jurisdiction of the U. S. A. 34 USC s 1200 Art. 6. -

Because of the alleged 'former jeopardy' (Const. Amdt. V), petitioner claims the Navy court, in the 1946 trial, was without jurisdiction and hence the writ should issue."

The Court below based its order denying appellant's application for writ of habeas corpus on the sole ground that the appellant, being a member of the Naval service of the United States, was not entitled to the protection of the specific guarantees of the Fifth Amendment to the Constitution, which amendment contains the prohibition against placing a person twice in jeopardy. From the order dismissing petition for writ of habeas corpus, appellant now appeals to this Honorable Court. (Tr. 21.)

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#### **QUESTION INVOLVED.**

*Is an alleged erroneous decision of a Naval Court-martial overruling a plea of former jeopardy, cognizable in habeas corpus in the civil courts?*

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#### **CONTENTION OF APPELLEES.**

The answer to the above stated question is: NO.

## ARGUMENT.

**AN ALLEGED ERRONEOUS DECISION OF A NAVAL COURT-MARTIAL, OVERRULING A PLEA OF FORMER JEOPARDY IS NOT COGNIZABLE IN HABEAS CORPUS IN THE CIVIL COURTS.**

In denying appellant's application for habeas corpus the Court below said as follows:

“Unless it appears that the Navy court lacked jurisdiction, this court may not review its judgment. *U. S. v. Grimley*, 137 U.S. 147; *Swaim v. U. S.*, 165 U.S. 553; *Mullan v. U. S.*, 212 U.S. 516; *Ex parte Mason*, 105 U.S. 696; *Ex parte Reed*, 100 U.S. 13; *Carter v. McClaughry*, 183 U.S. 365. To resolve the jurisdictional issue, it is not necessary to decide whether a court martial conviction of the crime of manslaughter, where there has been a previous trial of the crime of assault with intent to commit murder, amounts to double jeopardy. This is for the reason that the specific guarantees of the 5th amendment to the Constitution relating to criminal prosecutions may not be invoked in ‘cases arising in the land or naval forces’ of the United States. *Ex parte Quirin*, 317 U.S. 43; *Ex parte Milligan*, 71 U.S. 2, 123; *U. S. ex rel. Innes v. Crystal* (2 Cir.), 131 Fed. (2d) 576; *Ex parte Benton*, 63 Fed. Supp. 808. The Naval court's decision denying the plea of double jeopardy may have been erroneous. But such errors of law by courts martial are not of themselves reviewable or correctible in the civil courts.” (Tr. 18.)

The Court below then went on to say that if the decision of the court-martial violated the “‘basic doctrine of fairness’ under the due process clause of the

Constitution", such action on its part would divest it of any jurisdiction, and accordingly any conviction resulting from such a decision would be void. (Tr. 19.)

The Court below then asked itself the question as to whether or not the treatment given the appellant by the Navy court was so "unfair" as to constitute a lack of due process under military law. The Court below answered the question adversely to appellant in the following language:

"Petitioner was represented by counsel during both courts martial. No claim is made of any unfairness in the conduct of his trials. It is not claimed that he was denied the right to produce witnesses or to cross examine witnesses. Nor is any conduct of the court itself complained of. The contentions made here were urged, both at his second court martial and upon review by the Judge Advocate General. They were determined adversely to him. Under military law, the decisions may have been wrong. But we may correct them here, only if the errors amount to a denial of due process.

It is a reasonable inference, as it would be in the civil courts, that the charge of assault with intent to commit murder was added to the charge of murder at the first court martial in order to provide for the exigencies of proof. Obviously acquittal of the assault charge was in the nature of a dismissal of that charge, because of the finding of guilt of murder. The entire record of petitioner's case negatives the assumption that he may have been acquitted of assault with intent to commit murder due to a lack of the required degree of proof to establish the commission by



him of any assault upon the deceased at all, or of an intent to kill. Indulgence in this assumption would require complete disregard of the fact that the court martial believed and found him guilty of the greater crime of murder.

Nothing in the record presented by the petition indicates a violation of the basic doctrine of fairness. It is true that much fumbling and delay by the Naval authorities is disclosed. At least, from the civil viewpoint, it may be so characterized. But I may not issue the writ for such reasons. In fact, nothing about this case bestirs any judicial urge to invoke the great writ of habeas corpus. Moreover, it may not be amiss to point out that the plight of petitioner, under all the circumstances, is not too unfortunate. Indeed he may have been more severely dealt with in the first instance had not the Naval authorities made the jurisdictional mistake of charging him with murder.

My conclusion is that the showing made fails to demonstrate a breach of the broad and basic doctrine of fairness under the due process clause.”  
(Tr. 19-20.)

The appellees are in complete accord with the ruling of the Court below, that the specific guarantees of the Fifth Amendment are not available to the appellant because he is a member of the armed forces and urges that the Court below be upheld in its decision. The appellees of course adopt the authorities cited by the Court below in reaching the conclusion which it did.

**THE ACTIONS OF THE NAVY COURT WERE NOT SUCH AS TO  
CONSTITUTE LACK OF DUE PROCESS UNDER MILITARY  
LAW.**

As to the question of whether or not the proceedings before the Naval Court were so unfair as to constitute a lack of due process under military law, the appellees herein, in support of the Court below, will now amplify this phase of the case.

As indicated, appellant contends that the second court martial lacked jurisdiction over the crime of manslaughter because of a previous acquittal of a lesser included offense by what the appellant terms a "fully constituted naval general court martial". It is significant that appellant was tried for manslaughter at the second trial only because the Navy lacked jurisdiction in the first instance of the charge of murder. At the first trial the main charge was murder and the charge of assault with intent to commit murder was preferred only to provide for the contingencies of proof. The facts in the case warranted a finding of guilty on a charge of murder and it was then necessary to make a disposition of the minor charge of assault with intent to commit murder. The acquittal on minor charge went merely to the exigencies of proof since there could be no assault with intent to commit murder where the intent had been consummated. When the first trial, proceedings, findings and sentence were set aside for lack of jurisdiction over the crime of murder the effect was to nullify the whole process from its inception. In answer to the contention by the appellant that there

was an acquittal of a lesser included offense in the first trial by a fully constituted naval general court martial which barred the trial and conviction for the crime of manslaughter at the second trial, appellees assert that the first court, lacking jurisdiction, was a nullity and that appellant was not duly tried and acquitted of any offense at that time. No practical injustice was inflicted on the accused in this case since the so-called acquittal on the charge of assault with intent to commit murder in the first trial would not have resulted if there had been any question at that time of the illegality of the charge of murder for which petitioner was tried.

It is well established that second jeopardy does not attach where a Court has no jurisdiction of the offense charged. In the case of

*Wolkoff v. United States*, 84 Fed. (2d) 17, the Court held appellant not in double jeopardy upon reindictment and trial resulting from faulty indictment in the first instance. The Court said the two essentials of legal jeopardy are that Courts have jurisdiction and that indictment be valid.

The appellant objects to his confinement following a determination that the first court-martial lacked jurisdiction over the crime of murder. When the first trial was set aside for lack of jurisdiction over the crime of murder, the Navy Department continued to have jurisdiction over petitioner and his confinement was in order until his case was disposed of by a Court of competent jurisdiction.

The case of

*Grafton v. United States*, 206 U. S. 334, is relied on by the appellant to support his plea of second jeopardy. That case can be distinguished from the facts in this case. In the *Grafton* case the accused was tried twice, first by court-martial, and later by the Philippine Civil Courts, both of which Courts owed their existence wholly to the United States. The acquittal, therefore, by the general court-martial precluded a second trial by the Philippine Civil Courts for the same offense. This, obviously, was double jeopardy since the first Court had jurisdiction over the crime and the person. Jurisdiction over the crime charged was lacking in the present case in the first trial.

The appellant contends also that the assault with intent to commit murder charged at the first trial is a lesser included offense of the charge of manslaughter preferred at the second trial. As pointed out above it is the position of the appellees that the first trial was a nullity in its entirety and therefore of no effect. Assuming, but not admitting, that some effect must be given the acquittal at the first trial on the basis of a relation between assault with intent to commit murder and manslaughter, it is the further contention of the appellees that the two charges are separate and distinct as a matter of law. In this connection it should be noted that under the Federal statute dealing with assaults, a clear cut distinction is made between simple assault and assault with intent to commit murder, 18 USC 455. The appellant fails

to note the above distinction, a distinction which is adopted in Naval Courts and Boards. This distinction is important because while simple assault of its nature is a lesser included offense under either murder or manslaughter, assault with intent to commit murder is not a lesser offense under manslaughter. It is well established that an acquittal in one indictment is not a defense for another action based on the same set of facts where the second action is a separate and distinct charge from the first indictment.

*Stone v. United States*, 167 U.S. 178.

In the case of

*Gravieres v. United States*, 220 U.S. 338,

it was held that a conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another unless the evidence required to support conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. The plea (double jeopardy) will be vicious if the offense as charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in point of fact. Gravieres was convicted under an ordinance prohibiting drunkenness, and rude and boisterous language, and the Court held that he was not put in double jeopardy by being subsequently tried under another ordinance for insulting a public officer although the latter charge was based on the same conduct and language as to the former. In the

instant case, even assuming that the first trial was not a nullity, which appellees contend it was, for lack of jurisdiction, the charge of manslaughter preferred at the second trial, while growing out of the same facts, was a distinct and separate charge in point of law and cannot be barred by a plea of former jeopardy.

In the case of

*McCarthy v. Zerbst*, 85 Fed. (2d) 640, the general rule for establishing jeopardy was announced substantially as follows: Where a person has been placed on trial on a valid indictment or information before a Court of competent jurisdiction; has been arraigned and has pleaded, and the jury has been impaneled and sworn, he is in jeopardy, but until all these things have been done, jeopardy does not attach. The general rule presupposes all of the above ingredients including a trial before a Court of competent jurisdiction. By the appellant's own admission the naval court-martial in the first instance had no jurisdiction over the crime of murder. The plea of double jeopardy must therefore fail since the entire proceedings of the first court were set aside including the disposition of the minor charge of assault with intent to commit murder, which went only to the exigencies of proof.

The second court-martial proceedings in this case being necessary because of jurisdictional error which nullified the first proceedings, the rule as announced in the case of

*Palko v. Connecticut*, 302 U.S. 320,

is applicable. In that case it was held that where a new trial is ordered because of error and the accused is placed on trial a second time, it is not the sort of hardship to the accused that is forbidden by the 14th Amendment. In the *Palko* case the defendant was tried and found guilty of the crime of murder and sentenced to life imprisonment. The State of Connecticut appealed under a statute permitting appeal in criminal cases. The Supreme Court of Errors found procedural error and ordered the defendant to be retried. He pleaded double jeopardy. The Court overruled the plea, found him guilty and sentenced him to death. The Supreme Court affirmed the proceedings, using the following language:

“Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our policy will not endure it? Does it violate those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions? The answer surely must be ‘No’. \* \* \* It (the statute) asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error.

“If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary to purge the vicious taint.

“The conviction of appellant is not in derogation of any privileges or immunities that belong to him as a citizen of the United States.”

In the case of

*Murphy v. Massachusetts*, 117 U.S. 155,  
the Court went even further. It held that a sentence and conviction after reversal of a former judgment on application of the accused, who had alleged that the judgment was imposed under a statute passed after the offense was committed and therefore unconstitutional, does not violate the constitutional provision against double jeopardy although the accused had served an invalid sentence before the judgment was reversed, including confinement. The case of

*Commonwealth v. Peters*, 12 Met. 387,  
held that an acquittal before a Court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void and therefore no bar to subsequent indictment and trial in a Court which has jurisdiction of the offense. To the same effect see also

*United States v. Ball*, 163 U. S. 662;

*Deming v. M'Claghry*, 113 Fed. 639;

*United States v. Ratagczak*, 275 Fed. 558;

*Houston v. United States*, 5 F. (2d) 497;

*United States v. Tyler*, 15 F. (2d) 207;

*Johnsen v. United States* (CCA-9), 41 F. (2d)

44;

*Wolkoff v. United States*, *supra*.

The first court-martial of appellant being void for lack of jurisdiction over the crime of murder, all of the proceedings in that trial were void. In

*Collins v. Loisel*, 262 U.S. 426,

it was held that a discharge, because of irregular proceedings under a writ of habeas corpus of one arrested



in extradition proceedings, was not *res adjudicata* beyond issues necessarily involved in the conclusion that the accused was illegally in custody at time of discharge, so as to prevent subsequent arrest for extradition for the same alleged offense. In the case of

*Re Bonner*, 151 U. S. 242,

it was held that one on whom an unlawful sentence has been imposed, upon being discharged on habeas corpus, may be sentenced in accordance with law on the subject. All of the foregoing cases unequivocally show that the plea of double jeopardy is not available as a sham to obscure justice. In denying the validity of the second trial the petitioner is attempting to traverse the mechanism of judicial procedure by setting up a bar which the law never intended as a means to defeat justice.

The case of

*Daggart v. State*, 93 S.W. 299,

cited by the appellant, does not apply because in that case there had been a trial by a Court of competent jurisdiction in the first instance, which is not a fact in our case. The language in the case of

*State v. Hoot*, 120 Iowa, 238,

as cited by the appellant, has no application here since it also presupposes action by a Court of competent jurisdiction in relation to a charge of assault with intent to commit murder.

The contention by the appellant that the Judge Advocate General denied the appellant the right of

review in rendering an opinion that the second court-martial did not constitute double jeopardy is wholly unfounded. The appellant has never been denied the right of review. Accordingly this complaint is completely without merit.

To summarize this phase of the case, appellees believe that it has been shown conclusively the treatment given the appellant by the Navy Court was not so unfair as to constitute lack of due process under military law. In fact appellees repeat what the Court below said:

“Moreover it may not be amiss to point out that the plight of petitioner, under all the circumstances, is not too unfortunate. Indeed he may have been more severely dealt with in the first instance had not the naval authorities made the judicial mistake of charging him with murder.”  
(Tr. 20.)

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**THE QUESTION OF DOUBLE JEOPARDY CAN NOT BE  
RAISED BY HABEAS CORPUS.**

The appellees have concerned themselves in this brief with the question as to whether or not an erroneous decision by a naval court-martial overruling a plea of double jeopardy is cognizable in habeas corpus in the civil Courts. The appellees under authority of this Honorable Court can go further and assert that the defense of double jeopardy is never cognizable in habeas corpus, whether the party asserting it be complaining of the action of a civil or a military tribunal.

See

*Crapo v. Johnston*, 144 F. (2d) 863, 864, certiorari denied December 4, 1944,

where this Honorable Court said:

“There is no merit in the appellant’s claim that the trial court is without jurisdiction or that he has suffered double jeopardy for the same offense, although the latter question can not be raised by habeas corpus.”

To the same effect see

*Kastel v. United States* (CCA-4), 30 F. (2d) 687, 688.

For a contrary view, however, see

*Clawans v. Rives* (CCA-DC), 104 F. (2d) 840.

The Supreme Court of California, in the case of

*In re Harron*, 191 Cal. 457, 466,

has held that habeas corpus is an available remedy only where it is sought upon the claim that the prisoner has been placed in jeopardy for the identical offense, and not where it is merely contended that a prior conviction or acquittal on a particular charge or on particular facts is a bar to a new charge. In our case at bar the appellant’s grievance is not predicated on his being twice placed in jeopardy for an identical offense, but on an allegation of a second trial for an included offense. It should be called to the attention of this Court that the problem involved in

*Crapo v. Johnston*, *supra*,

was that of included offenses, although the Court drew no distinction between a grievance predicated on

a prisoner being twice placed in jeopardy for an identical offense, rather than on an allegation of a second trial for an included offense. In any event, the appellant can find no comfort in the holding of this Court in *Crapo v. Johnston*, *supra*.

---

### SUMMARY.

A member of the armed forces is not entitled to the protection of the Fifth Amendment, which contains a prohibition against "double jeopardy". A member of the armed forces is entitled to redress in the civil Courts only if the treatment accorded him by the court-martial was of such a nature as to constitute a denial of the "basic doctrine of fairness" under the due process clause of the Constitution.

The treatment accorded to appellant was extremely fair.

Assault with intent to commit murder and manslaughter are not included offenses, but even if they were, an erroneous decision by the court-martial would not constitute a denial of due process as might a refusal of the court-martial to entertain and pass upon the plea of former jeopardy, if interposed.

The original court-martial lacking jurisdiction over the crime of murder committed within the territorial limits of the United States, the entire proceedings before it may properly be considered a nullity.

Finally, the defense of former jeopardy is not cognizable in habeas corpus, and more particularly where

the defense is interposed on the ground of a prior acquittal of an included offense, as contrasted with a prior acquittal of an identical offense.

---

**CONCLUSION.**

In view of the foregoing, it is respectfully urged that the order of the Court below is correct and should be affirmed.

Dated, San Francisco,  
November 24, 1947.

Respectfully submitted,

FRANK J. HENNESSY,

United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,

*Attorneys for Appellees.*



No. 11,682

IN THE

**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

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MATTHEW WRUBLEWSKI,

*Appellant,*

vs.

CAPTAIN S. X. MCINERNEY, Command-  
ing Officer of United States Naval  
Receiving Station, Yerba Buena  
Island, San Francisco, California,  
and REAR ADMIRAL D. B. BEARY,  
United States Navy, Commandant  
12th Naval District, San Francisco,  
California,

*Appellees.*

Upon Appeal from the District Court of the United States for the  
Northern District of California, Southern Division.

**CLOSING BRIEF FOR APPELLANT.**

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EDWIN S. WILSON,

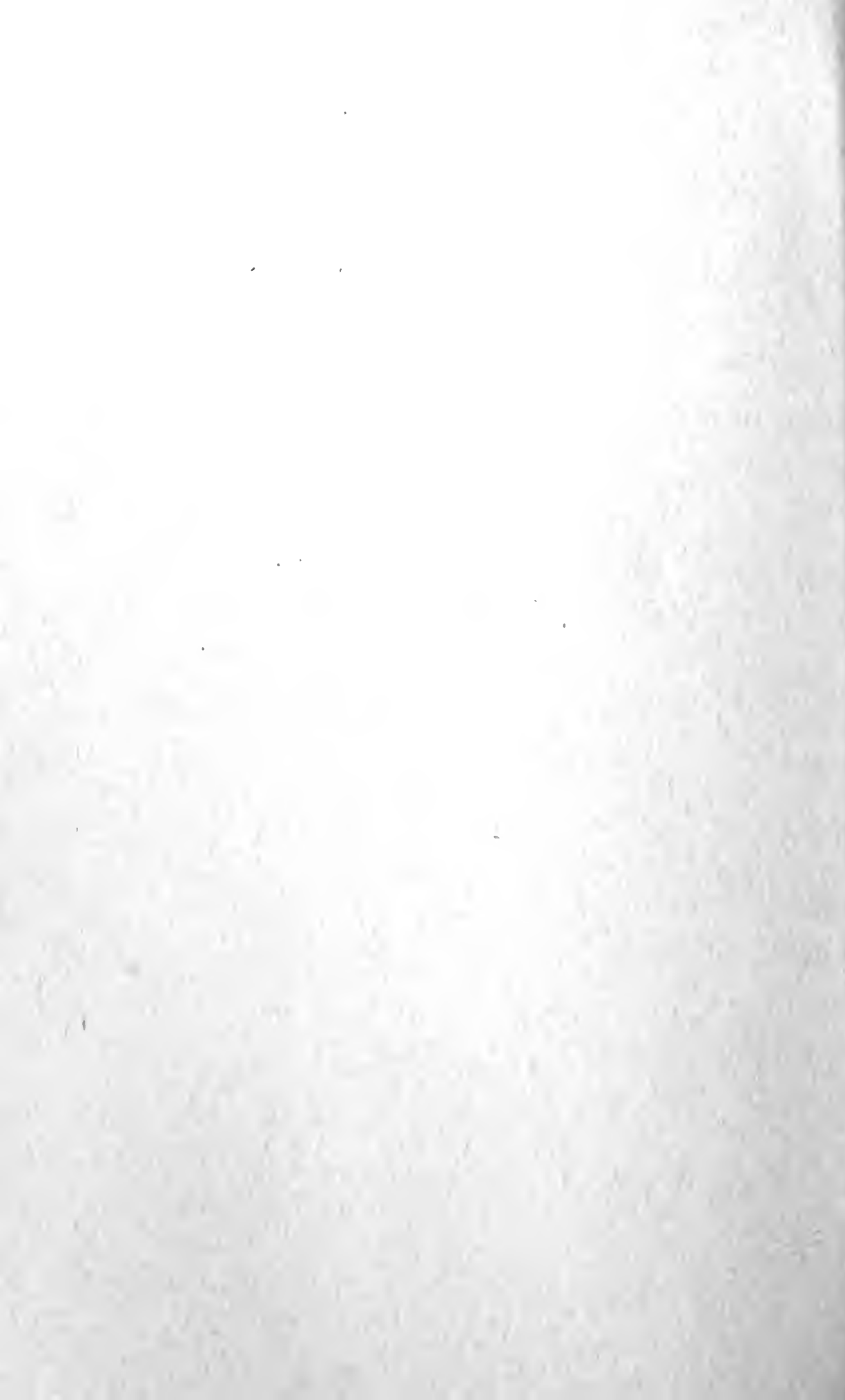
512 De Young Building, San Francisco 4, California,

*Attorney for Appellant.*

FILED

DEC 5 - 1947

PAUL P. O'BRIEN,





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IN THE

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MATTHEW WRUBLEWSKI,

*Appellant,*

vs.

CAPTAIN S. X. MCINERNEY, Command-  
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Receiving Station, Yerba Buena  
Island, San Francisco, California,  
and REAR ADMIRAL D. B. BEARY,  
United States Navy, Commandant  
12th Naval District, San Francisco,  
California,

*Appellees.*

Upon Appeal from the District Court of the United States for the  
Northern District of California, Southern Division.

## CLOSING BRIEF FOR APPELLANT.

---

Appellant in this closing brief will confine the argu-  
ment to a brief summary of the facts in the case and  
a reply to appellees' argument.

### STATEMENT OF FACTS.

The facts which are before this court are well summarized in the transcript of record and in both the opening brief of appellant and the brief for appellees. There appears to be no controversy in the record insofar as what has taken place in this case with respect to the various trials of appellant.

Appellant has been tried by two Navy Courts Martial. The first trial was on December 11, 1944, and the charges were (1) murder and (2) assault with intent to commit murder. The facts in both charges alleged the same time and circumstances surrounding the death of one Lieutenant Roland S. Travis. This first trial resulted in a conviction of murder, and acquittal on the second charge of assault with intent to commit murder. The proceedings as to the murder charge were void for lack of jurisdiction over this crime. It is contended by appellant that the court had jurisdiction over the crime of assault with intent to commit murder.

The second trial, held on July 30, 1946, charged the accused with manslaughter (voluntary and involuntary). A plea in bar of trial was duly entered alleging that the previous acquittal at the first trial was a bar to any further prosecution for the homicide of Lieutenant Travis. This plea in bar was denied, and the court found the accused guilty of voluntary manslaughter, dismissed him from the service and sentenced him to five years in prison, which sentence the accused is now serving and which sentence began to run on February 5, 1947, which was the time that

appellant was notified by the Navy department of the final action taken in his case. When this sentence became final, a petition for a writ of habeas corpus was filed in the United States District Court, seeking the release from custody of appellant on the grounds that the second trial, conviction and sentence, and the restraint of appellant, violated that portion of the Fifth Amendment of the Constitution which guarantees one against double jeopardy. The District Court dismissed the petition on the grounds that "the specific guarantees of the Fifth Amendment to the Constitution relating to criminal prosecution may not be invoked in cases arising in the land or Naval forces of the United States." From this decision appellant appeals to this honorable court and prays that the decision of the District Court may be reversed and appellant released from imprisonment and restored to his liberty.

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#### **POINTS RELIED UPON BY APPELLANT.**

The questions of law involved in this case appear to embrace the following principles:

1. Does that portion of the Fifth Amendment to the Constitution relating to double jeopardy apply to members of the Naval service? Does one upon joining the Naval service forfeit his constitutional right to immunity from punishment twice for the same offense, or does he forfeit this right to protection of the Constitution upon joining the United States Navy for the purpose of protecting that same Constitution?

2. If the answer to the first question is resolved to be that members of the Naval service are protected by the double jeopardy clause of the Constitution, then is it double jeopardy to prosecute an accused for a homicide where that same accused has been acquitted by a court of competent jurisdiction of the assault from which the homicide resulted? This second question may be put another way. Where the first court, having all of the facts before it, finds the accused not guilty of assault with intent to commit murder, may the same authority ignore this finding and imprison the accused as the result of a prosecution for homicide in which the prosecution's evidence was necessarily the same as that produced in the first trial?

3. The appellee raises the question as to whether or not habeas corpus is the proper method of effecting the release of one in confinement, allegedly confined on a void sentence.

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### **ARGUMENT.**

#### **DOES THE FIFTH AMENDMENT PROTECT NAVAL PERSONNEL FROM DOUBLE JEOPARDY?**

Appellees, in quoting the opinion of the District Court, admit that that portion of the Fifth Amendment relating to due process does apply to Naval personnel, and in the same opinion bases its conclusion in the statement that "the specific guarantees of the Fifth Amendment to the Constitution relating to criminal prosecution may not be invoked in cases arising in the land or Naval services of the United States." The

cases cited by the court and relied upon by appellees in their brief, page 5, have been pointed out in appellant's opening brief to have no bearing on the instant case, as in not one of those cases was the question of double jeopardy discussed. The fact that Naval personnel are protected by the clause of the Fifth Amendment concerning double jeopardy was unquestioned by the Judge Advocate General of the Navy in Court Martial Order 141-1918, p. 17. This guarantee was likewise unquestioned by the Attorney General in his opinion, 9 Ops. Attorney General 223, 230 (1858).

The case of *Sanford v. Robbins*, 115 Fed. (2d), 435, 438 (C.C.A. 5th, 1940) held:

“We have no doubt that the provisions of the Fifth Amendment ‘nor shall any person—be twice put in jeopardy’—is applicable to courts martial. The immediate preceding exception of ‘cases arising in the land or Naval forces’ from the requirement of an indictment apparently shows that such cases were excepted from the other provisions.”

See also

*Grafton v. U. S.*, 206 U. S., 333;

*U. S. v. Haitt*, 141 Fed. (2d), 664;

*Ex parte Costello*, 8 Fed. (2d) 386;

Section 408, Naval Courts and Boards Courts Martial 8, 1929, pages 14 and 15.

Particular attention is again called to the quotation in the case of *U. S. v. Haitt*, 141 Fed. (2d), 664, which is quoted on page 10 of appellant's opening brief.

The above entitled authorities appear to resolve this question of whether or not the specific guarantees of the Fifth Amendment apply to cases arising in the land and Naval forces. Appellant failed to find one case cited by the appellees which hold to the contrary. As stated before, the cases relied upon by the District Court dealt with material foreign to double jeopardy.

It is interesting to note the analysis of the present case *In re Wrublewski*, 71 Fed. Supp. 145 (N. D. Cal., 1947), as made by the University of Pennsylvania Law Review. This Law Review discusses this case as follows:

“Those properly under military jurisdiction are specifically excepted by the Fifth Amendment from the right to grand jury indictment. The clause providing this exception is relied upon in the instant case further to except military personnel from the protection against double jeopardy. The court’s authority for this extension is broad language in cases where the applicability of the double jeopardy clause was not in issue. Observing that all of the Fifth Amendment relating to criminal prosecutions is inapplicable to courts martial, the court curiously then bases its refusal to review the findings on the due process clause of the same amendment, on the grounds that under the fairness doctrine the latter clause has not been violated.”

Further quoting the University of Pennsylvania Law Review (*supra*):

“The decision as to the double jeopardy clause is contrary to the plain language of the Fifth Amendment—A just result, however, will only be



available upon the recognition that the holding in the instant case is based on inappropriate dicta.”

Appellant agrees with this Law Review article in its criticism of the erroneous conclusions reached by the District Court in stating that a member of the Naval forces can be subjected to double jeopardy with impunity and there can be no relief under the Constitution.

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**DOES AN ACQUITTAL OF ASSAULT WITH INTENT TO COMMIT MURDER PRECLUDE FURTHER PROSECUTION FOR A HOMICIDE RESULTING FROM THIS SAME ASSAULT ON THE SAME PERSON?**

Appellee cites many cases in his brief which are predicated on the fact that where the proceedings of a trial are void for lack of jurisdiction no jeopardy emerges. Appellant agreed with this statement of the law but contends here that those cases cited by appellees are not in point for the reason that in appellant's first trial the proceedings as to the charges of assault with intent to commit murder were valid: the military court clearly has jurisdiction over a charge of this kind. The fact that the court lacked jurisdiction over the offense of murder did not invalidate the entire proceedings. This statement is substantiated by *Rosborough v. Rossell*, 56 Fed. Supp., 347, Court Martial Order 9-1945, p. 399. In this case the accused was tried on one charge, that of murder; the proceedings were set aside for want of jurisdiction, and later accused was tried for manslaughter. No double jeopardy resulted here as the first court had absolutely no juris-

diction to try the accused for murder *and there was no other charge before the court*. The court said:

“Rosborough might have been brought to trial on a charge of murder and the specification thereunder and a separate charge of manslaughter and a specification thereunder. In such a case, the court martial would have no jurisdiction of the murder charge. That would not have rendered the proceedings wholly void since it would have had jurisdiction of the charge of manslaughter, since a finding of guilty of manslaughter only and a sentence therefor would have been valid.”

Similarly, in the instant case, there were two charges, murder, over which the court had no jurisdiction, and assault with intent to commit murder, over which the court did have jurisdiction. The proceedings under the second charge were valid. This constituted being put in jeopardy once for assault with intent to commit murder and all included offenses and all greater offenses of which this offense may be a part. Therefore, following the herein mentioned acquittal, the Naval General Court Martial, on July 30, 1946, had no authority to try appellant.

The acquittal of appellant by the first court cannot be attacked by any civil court. This is for the reason that where a court has jurisdiction and does not exceed its jurisdiction the civil courts may not attack the judgment of the military court regardless of how erroneous its decision might have been. This principle has been relied upon by both appellant and appellee and clearly is not disputed. Therefore, it was error on the part of the District Court to indulge in an

attempt to excuse the Naval court's action in acquitting appellant of the assault charge. That acquittal stands and cannot be attacked. It may have been erroneous, but the error committed by the Naval authorities in preferring a charge of murder when it had no jurisdiction of this charge cannot be the basis of ignoring a valid legal acquittal. There is just no provision whereby an acquittal by a court of competent jurisdiction may be set aside. We are not permitted to speculate on how the trial court arrived at an acquittal. It is contended by appellee that the charge of assault with intent to commit murder was preferred to provide for the exigencies of proof. This might have been, but legally the proceedings as to the murder charge and that alone were void, and legally the acquittal of the second charge was valid. There we have the result of the first trial, and the result is the only phase of the trial which concerns us, which leads us to the conclusion, once establishing that there was a valid acquittal of assault, can the Navy Department put appellant in jeopardy a second time on the same facts for the same offense, whether that offense be identical or whether there is a greater offense of which the first charge was a part?

Appellee cites no authority to indicate that a trial by Court Martial is void as to its entire proceedings if the court should lack jurisdiction over one of many charges before it. In the instant case let us assume for the sake of discussion that the assault charge was preferred to provide for the exigencies of proof or any other exigencies. In this case the first court might

have convicted the accused of both charges, referring it to the reviewing authority to set aside any lesser offense. Had they done this, then when someone in the Navy department finally realized that Courts Martial have no jurisdiction of murder allegedly committed within the territorial jurisdiction of the United States, the accused would have stood convicted of the second charge and not escaped punishment if the facts warranted punishment. The first court in acquitting the accused of assault with intent to commit murder assumed that it had a valid conviction of the murder charge. When this was proved to be a nullity, by process of simple elimination, there was left standing one valid act of that court, namely an acquittal. The second court had no jurisdiction over the second charge as the Constitution bounds and limits all jurisdiction, and whenever there is a violation of an express provision of the Constitution, this violation ousts the court of jurisdiction.

As to the question of whether or not an acquittal of an assault with intent to commit murder may bar a prosecution involving the same facts on a charge of manslaughter, it may be readily recognized that according to Section 119 of *Naval Courts and Boards* "an assault is a lesser included offense of manslaughter whether voluntary or involuntary."

The cases of *Grafton v. U. S.*, 206 U. S., 333; *Daggert v. State*, 93 S. W., 399; *State v. Hoot*, 120 Iowa, 238, and in 26 Amer. Jurisprudence 276, are all sufficient authority for the proposition that in double jeopardy the offenses do not have to be identical, but

it is sufficient if the facts are the same and one charge includes the other, or one charge is a part of a greater charge.

Agreeing with 26 Amer. Jurisprudence, 279,

“It is rather difficult to conceive of a prosecution for homicide resulting from an assault where the defendant has been found innocent of committing the assault.”

The crime of assault is certainly included in a crime of manslaughter. An assault is a lesser offense of the aggravated charge of assault with intent to commit murder. To permit the prosecution for an alleged assault with intent to commit murder, then a second prosecution for manslaughter clearly places the accused twice in jeopardy for the crime of assault, and this is not permitted by the Constitution. Were this not so, accused could have been acquitted of assault, then tried for manslaughter and acquitted again, then brought to trial a third time for scandalous conduct, all three trials having presented before it the same facts. There would be no end to prosecutions in the Navy if we say that Naval personnel are not protected by the Constitution against prosecution for included offenses.

From appellees' point of view it may be awkward to admit the mistake committed by the first court, if it did make a mistake, in acquitting the accused, but again, since that court had jurisdiction, its findings are final, and this acquittal must be recognized by all courts.

lant's imprisonment, and the decision of the District Court should be reversed and appellant released from confinement and restored to duty as an officer of the United States Navy.

Dated, San Francisco, California,  
December 3, 1947.

Respectfully submitted,

EDWIN S. WILSON,

*Attorney for Appellant.*

No. 11686

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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ESTATE OF HOMER LAUGHLIN, Deceased,  
BEACH D. LYON, Administrator with the  
will annexed,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

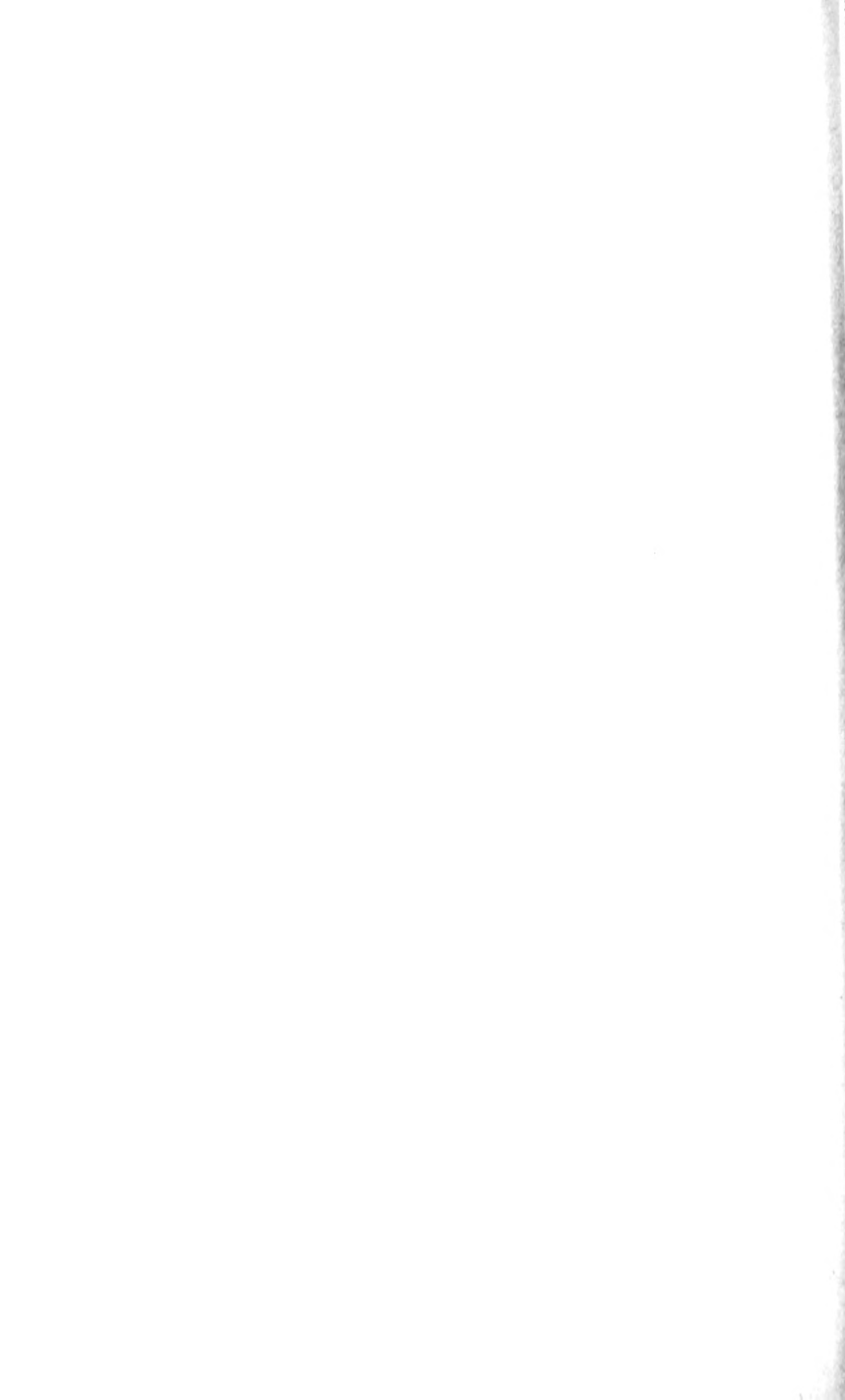
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Transcript of the Record

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Upon Petitions to Review a Decision of the Tax Court  
of the United States

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No. 11686

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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ESTATE OF HOMER LAUGHLIN, Deceased,  
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Transcript of the Record

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Upon Petitions to Review a Decision of the Tax Court  
of the United States



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## APPEARANCES

For Taxpayer:

JOSEPH D. BRADY

WALTER L. NOSSAMAN

JOHN O. PALSTINE

STANLEY C. ANDERSON

For Commissioner:

E. A. TONJES

R. TRANSUE

Docket No. 5891

ESTATE OF HOMER LAUGHLIN, Deceased,  
BEACH D. LYON, Administrator with Will  
Annexed,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

## DOCKET ENTRIES

1944

Aug. 25—Petition received and filed. Taxpayer notified. Fee paid.

26—Copy of petition served on General Counsel.

25—Request for Circuit hearing in Los Angeles filed by taxpayer. 8/28/44 Granted.

Sept. 23—Answer filed by General Counsel.

29—Copy of answer served on taxpayer, Los Angeles, Calif. calendar.

1946

Apr. 16—Hearing set June 10, 1946, Los Angeles.

June 10—Hearing had before Judge Black on merits. Stipulation of facts and exhibits attached thereto filed at hearing. Petitioner's brief due 7/25/46; respondent's brief due 8/25/46; petitioner's reply due 9/15/46.

July 5—Brief filed by taxpayer. 7/8/46 copy served.



1946

July 8—Transcript of hearing 6/10/46 filed.

Aug. 26—Reply brief filed by General Counsel.  
Served 8/27/46.

Sept. 13—Reply brief filed by taxpayer. 9/16/46  
copy served.

1947

Jan. 16—Opinion rendered, Judge Black. Decision will be entered under Rule 50.  
Copy served.

Feb. 17—Respondent's computation for entry of decision filed.

18—Hearing set March 26, 1947 on Rule 50, Washington, D. C.

Mar. 26—Hearing had before Judge Turner on settlement. Ordered referred to Judge Black.

26—Decision entered, Judge Black, Div. 15.

June 20—Petition for review by U. S. Circuit Court of Appeals for the Ninth Circuit with assignments of error filed by taxpayer.

20—Proof of service of petition for review filed by taxpayer.

20—Statement of points on which petitioner on review intends to rely with proof of service filed by taxpayer.

20—Designation of contents of record with proof of service thereon filed by taxpayer. [1\*]

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\* Page numbering appearing at top of page of original certified Transcript.

The Tax Court of the United States

Docket No. 5891

ESTATE OF HOMER LAUGHLIN, Deceased,  
BEACH D. LYON, Administrator with the  
Will Annexed,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

### PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency determined by the Commissioner of Internal Revenue and set forth in his notice of deficiency (LA:IT:90D;PB) dated June 6, 1944, and as a basis on this proceeding alleges:

1. Petitioner is a probate estate in process of administration under the jurisdiction of the Superior Court of the State of California, in and for the County of Los Angeles, Probate Cause No. 132875 therein. The return of said estate for the taxable period here involved was filed with the Collector for the Sixth District of California on or before March 15, 1943.

2. The notice of deficiency, copy of which, [2] with accompanying statement, is attached hereto as Exhibit A, was mailed to the petitioner on June 6, 1944.

3. The taxes in controversy are income taxes for the calendar year 1942 in the sum of \$7,977.09.

4. In the determination of the deficiency, respondent committed the following errors:

a. Respondent erred in determining and holding that the taxpayer was not entitled to a deduction of the sum of \$1,200 paid to Ella West during the calendar year 1942.

b. Respondent erred in determining and holding that the taxpayer was not entitled to a deduction of \$9,600 paid to Ada Edwards Laughlin during the calendar year 1942.

5. The facts upon which petitioner relies as the basis for this proceeding in so far as the sum of \$1,200 paid to Ella West is concerned are as follows:

a. Homer Laughlin, Sr., father of Homer Laughlin, Jr., died on or about January 10, 1913, leaving a [3] last will and testament dated August 30, 1909, duly admitted to probate on January 29, 1913, in the Superior Court of the State of California in and for the County of Los Angeles, No. 22,692, which will contained among other provisions the following:

“Second: I give, devise and bequeath unto my nieces, Ella West and Nancy McIntosh, each the sum of One hundred dollars (\$100) per month, payable quarterly to each of them during their natural life.”

b. On August 1, 1921, Homer Laughlin, Jr., and Ella West entered into a written agreement, a copy of which is hereto annexed as Exhibit B and made part hereof.

c. The condition mentioned in the second paragraph of the August 1, 1921 agreement (Exhibit B) was duly complied with. About the . . . . . day of September, Ella West duly executed and delivered to Homer Laughlin, Jr. the release, copy of which appears in Exhibit B following the agreement therein set forth.

d. The Laughlin Building, mentioned in Exhibit B, is a building situated at No. 315 South Broadway, Los Angeles. At all times subsequent to about August 1, 1921, it was the property of Homer Laughlin, Jr. The latter died on or about December 27, 1932. The Laughlin Building was and is a part of his estate, which has been in process of administration in the Superior Court of the State of California in and for the County of Los Angeles since about [4] February 4, 1933, on which date the will of Homer Laughlin, Jr. was duly admitted to probate and Beach D. Lyon was appointed, and at all times since has been and is now, the duly appointed, qualified and acting administrator with the will annexed of said estate.

e. In May, 1933, a dispute having arisen between Ella West on the one hand and the Estate of Homer Laughlin, Jr., deceased, on the other, as to her rights under the contract and assignment of August 1, 1921, a suit for declaratory relief was brought by Ella West in the Superior Court of the State of California in and for the County of Los Angeles, Ella West vs. Beach D. Lyon, et al, No. 356,776, that court having jurisdiction of the parties and of the subject matter, to which suit all

persons having any interest in the subject matter were made parties. On the . . . . . day of June, 1933, the Court, in the declaratory relief suit, made its judgment, which judgment, omitting formal parts, reads as follows:

“Now, Therefore, by Virtue of the Premises It Is Hereby Ordered, Adjudged, and Decreed that on the 1st day of August, 1921, Homer Laughlin assigned to the plaintiff Ella West One Hundred (\$100) Dollars of the monthly rental due or to become due from the lessee of the ground floor of the Laughlin Building, which sum was to be paid to the plaintiff Ella West each month during the remainder of her natural life; that from and after said 1st day of August, 1921, Homer Laughlin had no right, title or interest in and to said sum of One Hundred (\$100) Dollars so assigned to this plaintiff; that the defendants Beach D. Lyon, and Beach D. Lyon as Administrator with the Will annexed of the estate of Homer Laughlin, have no right, title or interest in and to the said sum of One Hundred (\$100) Dollars of the monthly rental due or to become due from the lessee of the ground floor of the Laughlin Building, which sum of One Hundred (\$100) Dollars was to be paid to the plaintiff, Ella West, each month during the remainder of her natural life, and which sum was assigned by Homer Laughlin to plaintiff.”

This judgment has never been appealed from, reversed or modified. It remains at this present date in full force and effect.

f. By reason of the judgment, based on the August 1, 1921 assignment, and determining the rights of Ella West in respect of the matters mentioned in the judgment, Ella West was given and at all times since that date, and during the year 1942, owned and held a property interest in the Laughlin Building to the extent of \$100 per month of the monthly rental arising from the ground floor thereof; that by reason of such facts the \$100 per month payments to Ella West were and are excludible or deductible from the gross income of the taxpayer arising from the ground floor of the Laughlin Building for the year 1942; that the gross and net income derived from the source just mentioned exceeded during the year 1942 the \$1,200 from the rentals thereof so paid to Ella West.

6. The facts upon which petitioner relies as a basis for this proceeding, in so far as the sum of \$9,600 paid to Ada Edwards Laughlin is concerned are as follows:

a. On or about April 1, 1924, Homer Laughlin and his then wife, Ada Edwards Laughlin, entered into a property settlement agreement, which agreement was approved and confirmed in an interlocutory decree of divorce between those parties dated September 24, 1924, in Cause No. D28768 in the Superior Court of the State of California in and for the County of Los Angeles, and in a final decree duly made September 29, 1925, pursuant thereto.

The property settlement agreement of April 1, 1924, contained among other provisions the following:

“1. The party of the first part covenants and agrees to pay to the party of the second part for her support and maintenance the sum of Eight Hundred Dollars (\$800) per month during the term of her natural life; provided, however, that if the parties hereto should be divorced at any time in the future, and in such event the party of the second part should remarry, said monthly payments shall be reduced to the sum of Three Hundred Dollars (\$300) per month. The said payments shall be made in cash, lawful money of the United States, beginning on the first day of May, 1924, and shall be made each month thereafter at the city of Los Angeles, California, on or before the 15th day of each succeeding month.”

The parties of the first and second part referred to in the foregoing excerpt are respectively Homer Laughlin and Ada Edwards Laughlin. The latter is still living and has never remarried. Later provisions of the Agreement (paragraphs 9 and 10) provide for hypothecating the Laughlin Building to secure to Ada Edwards Laughlin the faithful performance of the contract by Homer Laughlin, Jr. Paragraph 10 provides in part: “The payments herein provided to be made by the party of the first part to the party of the second part shall survive [7] the death of the party of the first part and shall be binding upon his estate.” A copy of

the decrees of divorce (interlocutory and final) in Cause No. D28768 in so far as they pertain to the matters and things hereinabove mentioned, is attached hereto as Exhibit C and made part hereof.

b. As to the \$9,600 paid to Ada Edwards Laughlin during the year 1942 by petitioner, the estate of her deceased former husband, Homer Laughlin, pursuant to the property settlement agreement and the decree of divorce above referred to, petitioner contends that this sum is deductible by the Estate of Homer Laughlin, deceased, pursuant to the provisions of Sections 22(k), 23(u), 161, 162, 163 and 171 of the Internal Revenue Code.

Wherefore, petitioner prays that The Tax Court of the United States hear this proceeding and determine that there is no deficiency in income taxes for the taxable year 1942, and grant such other and further relief as may be equitable in the premises.

/s/ JOSEPH D. BRADY,  
/s/ WALTER L. NOSSAMAN,  
/s/ JOHN O. PALSTINE,  
/s/ STANLEY C. ANDERSON,  
433 South Spring Street,  
Los Angeles 13, California,  
Counsel for Petitioner.



State of California,  
County of Los Angeles—ss.

Beach D. Lyon, being first duly sworn, says that he is Administrator with the Will Annexed of the Estate of Homer Laughlin, and that affiant is duly authorized to verify the foregoing petition; that as such Administrator he has authority to act for the estate which is the petitioner herein; that he has read the foregoing petition, is familiar with the statements contained therein, and that the facts stated are true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

/s/ BEACH D. LYON.

Subscribed and sworn to before me this 17th day of August, 1944.

[Seal]                      JULIA M. FITZSIMMONS,  
Notary Public in and for the County of Los  
Angeles, State of California.

My Commission Expires February 17, 1948.

## EXHIBIT A

Treasury Department, Internal Revenue Service,  
417 South Hill Street, Los Angeles, 13, California

Office of Internal Revenue Agent in Charge Los  
Angeles Division. LA:IT:90D:PB

Jun 6 1944

Estate of Homer Laughlin, Deceased  
Mr. Beach D. Lyon, Administrator  
315 South Broadway  
Los Angeles, 13, California

Dear Mr. Lyon:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1941 and 1942, discloses a deficiency of \$8,647.89 for the taxable year ended December 31, 1942, and an overassessment of \$2,280.00 for the taxable year ended December 31, 1941, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are

requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA; Conf. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOSEPH D. NUNAN, Jr.

Commissioner,

By /s/ GEORGE D. MARTIN

Internal Revenue in Charge

PB:vmc

Enclosures:

Statement

Form of waiver

Form 843 [10]

Statement

LA:IT:90D:PB

Estate of Homer Laughlin, Deceased

Mr. Beach D. Lyon, Administrator

315 South Broadway

Los Angeles, 13, California

Tax Liability for the Taxable Years Ended

December 31, 1941 and 1942

## INCOME TAX

Year	Liability	Assessed	Overassessment	Deficiency
1941 .....	\$15,410.46	\$17,690.46	\$2,280.00	
1942 .....	38,467.38	29,819.49		\$8,647.89
<hr/>				
Total ....	\$53,877.84	\$47,509.95	\$2,280.00	\$8,647.89

In making this determination of your income tax liability careful consideration has been given to the report of examination dated October 30, 1943, to your protest dated February 5, 1944, and to the statements made at the conference held on February 21, 1944.

The overassessment shown herein will be made the subject of a certificate of overassessment which will reach you in due course through the office of the collector of Internal Revenue for your district, and will be applied by that official in accordance with section 322 (a) of the Internal Revenue Code, provided that you fully protect yourself against the running of the statute of limitations with respect to the apparent overassessment referred to in this letter, by filing with the collector of internal revenue for your district, a claim for refund on form 843, a copy of which is enclosed, the basis of which may be as set forth herein.

A copy of this letter and statement has been mailed to your representative, Mr. Walter L. Nosaman, 433 South Spring Street, Los Angeles, 13, California, in accordance with the authority contained in the power of attorney executed by you.

## ADJUSTMENTS TO NET INCOME

Taxable Year Ended December 31, 1941

Net income as disclosed by return.....	\$44,487.64
Additional deduction: Legal expense.....	4,000.00
	<hr/>
Net income adjusted .....	\$40,487.64

## Explanation of Adjustment

Legal expense accrued in this year, but paid and claimed as a deduction in the succeeding year, is allowed for this year since your return was rendered on the accrual basis.

## COMPUTATION OF TAX

Taxable Year Ended December 31, 1941

Net Income Adjusted .....	\$40,487.64
Less: Personal exemption .....	750.00
	<hr/>
Balance (surtax net income).....	\$39,737.64
Net income subject to normal tax.....	\$39,737.64
Normal tax at 4% on \$39,737.64.....	\$ 1,589.51
Surtax on                   \$39,737.64.....	13,820.95
	<hr/>
Total income tax .....	\$15,410.46
Correct income tax liability .....	\$15,410.46
Income tax assessed:	
Original, account No. 185776 .....	17,690.46
	<hr/>
Deficiency of income tax .....	\$ 2,280.00

## ADJUSTMENTS TO NET INCOME

Taxable Year Ended December 31, 1942

Net income as disclosed by return.....		\$55,471.51
Additional income and unallowable deductions:		
(a) Gross income from rents.....	\$1,200.00	
(b) Legal expense disallowed .....	4,000.00	
(c) Equipment costs disallowance.....	740.00	
(d) Payment to Ada Edwards		
Laughlin disallowed .....	9,600.00	15,540.00
	<hr/>	<hr/>
Total .....		\$71,011.51
Additional deductions:		
(e) Legal expense .....	\$3,500.00	
(f) Depreciation .....	308.33	
	<hr/>	<hr/>
Net income adjusted .....		\$67,203.18

## Explanation of Adjustments

(a) There is restored to gross income, or disallowed as a deduction therefrom, under the applicable provisions of the Internal Revenue Code, the exclusion or deduction of \$1,200.00 shown in Schedule C of your return as "Less assignment of rent to Ella West."

(b) Legal expense accrued in the preceding year, but paid and claimed as a deduction in this year, is disallowed for this year since your return was rendered on the accrual basis. This expense has been allowed as a deduction for the preceding year herein.

(c) The cost of equipment claimed as a deduction is disallowed; sections 24(a)(2) and (3) of the Internal Revenue Code. See also adjustment (f) below.

(d) The deduction of \$9,600.00 claimed for pay-

ment to Ada Edwards Laughlin on account of "property settlement agreement with [13] Homer Laughlin—\$800.00 per month for life" is not allowable under the Internal Revenue Code.

(e) Legal expense accrued in this year, but paid and claimed as a deduction in the succeeding year, is allowed for this year since your return was rendered on the accrual basis.

(f) Depreciation for ten months is allowed at the rate of 50 per cent per annum on the cost of equipment disallowed under adjustment (c) above.

#### COMPUTATION OF TAX

Taxable Year Ended December 31, 1942

Net Income Adjusted .....	\$67,203.18
Less: Personal exemption .....	500.00
	<hr/>
Balance (surtax net income).....	\$66,703.18
Net income subject to normal tax.....	\$66,703.18
Normal tax at 6% on \$66,703.18.....	\$ 4,002.19
Surtax on \$66,703.18.....	34,465.19
Total income tax .....	\$38,467.38
Correct income tax liability .....	\$38,467.38
Income tax assessed: Original account No. 37359.....	29,819.49
	<hr/>
Deficiency of income tax .....	\$ 8,647.89

#### EXHIBIT B

I, Ella West, in consideration of Five Hundred Dollars (\$500.00) in hand paid to me, and in further consideration of an assignment of One Hundred Dollars (\$100.00) per month of the rent to be paid by the lessee of the ground floor of the Laughlin Building, and in further consideration of the assumption of Homer Laughlin, Jr. to pay me the

said sum of One Hundred Dollars (\$100.00) per month during the remainder of my natural life, do hereby release the said Homer Laughlin, Jr., as Trustee, Guendolen V. Laughlin, and all of the property comprising the estate of Homer Laughlin, deceased, late of Los Angeles, California, from the payment of the annuity provided for in the will and decree of distribution in the estate of said Homer Laughlin, hereby releasing absolutely any claim of every character either against said persons or the property of said estate, the said lessee having recognized the said assignment and having agreed to pay to me the said sum monthly of the rent due and payable to the said Laughlin for the said ground floor of said building.

This agreement is to be placed in escrow and carried into effect and the said sum in cash to be paid to me by the Title Insurance & Trust Company in connection with the escrow under which said Laughlin is purchasing from the said Guendolen V. Laughlin all of her interest in said Laughlin Building and making a loan in order to complete [15] said purchase, and is contingent upon the consummation of the said deal through the Title Insurance & Trust Company.

(Notarial acknowledgment dated August 1, 1921.)



ELLA WEST

I, Ella West, for value received from Homer Laughlin, Jr., do hereby release the said Homer Laughlin Jr., as Trustee, Guendolen V. Laughlin, and all of the property comprising the estate of Homer Laughlin, deceased, late of Los Angeles, California, from the payment of the annuity provided for in the will and decree of distribution in the estate of said Homer Laughlin, hereby releasing absolutely any claim of every character either against said persons or the property of said estate.

In Witness Whereof I have hereunto set my hand this ..... day of September, 1921.

ELLA L. WEST. [16]

---

EXHIBIT C

Laughlin vs. Laughlin

D 28,768

Filed 1924 April 15, 1924

Order of default May 9, 1924

Interlocutory—September 24, 1924.

\* \* \* That on the first of April 1924, plaintiff and defendant entered into a property settlement agreement, by the terms of which all property rights, and maintenance of the plaintiff were determined and agreed upon,

Wherefore, it is hereby Ordered, Adjudged and

Decreed that the plaintiff is entitled to a divorce from the defendant; that when one year shall have expired, after the entry of this interlocutory judgment, a final judgment and decree shall be entered, granting a divorce herein, wherein and whereby the bonds of matrimony heretofore existing between said plaintiff and said defendant shall be dissolved;

And it is further ordered, adjudged and decreed that the said property settlement agreement be, and the same hereby is, ratified, approved and confirmed, and is hereby made a part of this decree by reference, and that the same shall be made a part of and incorporated in the final decree in this matter. [17]

#### Final Judgment of Divorce

It is further ordered, adjudged and decreed that that certain property settlement agreement, referred to in the interlocutory decree in this action and by reference made a part thereof, is hereby ratified, approved and confirmed, and the property of the parties hereto is hereby assigned in accordance with the terms of said agreement and the other rights and obligations of the parties hereto are assigned, determined and adjudged in accordance with the terms of said agreement, which agreement is hereby made a part of this judgment and is in words and figures as follows, to wit:

\* \* \*

[Endorsed]: Received and filed Aug. 25, 1944.

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the taxes in controversy are income taxes for the calendar year 1942; denies the remaining allegations contained in paragraph 3 of the petition.

4. Denies the allegations of error contained in subparagraphs (a) and (b) of paragraph 4 of the petition.

5. Denies the statements in subparagraphs (a) to (f), inclusive, of paragraph 5 of the petition for the reason that respondent lacks sufficient information from which to form a belief as to the truth or correctness thereof.

6. Denies the statements in subparagraphs (a) and (b) of paragraph 6 of the petition for the reason that respondent lacks sufficient information from which to form a belief as to the truth or correctness thereof.

7. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ J. P. WENCHEL            ECC  
Chief Counsel,  
Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,  
Division Counsel.

EARL C. CROUTER,

B. M. COON,

Special Attorneys,  
Bureau of Internal Revenue.

BMC/vc 9/18/44.

[Endorsed]: Received and filed Sep. 23, 1944.

Before the Tax Court of the United States

Docket No. 5891

In the Matter of:

ESTATE OF HOMER LAUGHLIN, Deceased,  
BEACH D. LYON, Administrator With the  
Will Annexed,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

Room 229, Post Office and Federal Bldg., Spring,  
Temple and Main Streets, Los Angeles, Cali-  
fornia, Monday, June 10, 1946—11:15 a. m.

(Met pursuant to notice.)

Before: Honorable Eugene Black,  
Judge.

Appearances:

Walter L. Nossaman, Esq., 631 Title Insurance  
Bldg., Los Angeles, California, appearing on behalf  
of Estate of Homer Laughlin, Deceased, Beach D.  
Lyon, Administrator with the Will annexed, Peti-  
tioner.

E. A. Tonjes, Esq., (Honorable J. P. Wenchel,  
Chief Counsel, Bureau of Internal Revenue), ap-  
pearing on behalf of the Commissioner of Internal  
Revenue, Respondent.

## PROCEEDINGS

The Clerk: 5891, Estate of Homer Laughlin.

Mr. Nossaman: Walter L. Nossaman for the petitioner.

Mr. Tonjes: E. A. Tonjes for the respondent.

Mr. Nossaman: The facts have been stipulated. We are ready to submit it upon the stipulation, if that is agreeable with the Court.

The Court: Very well. We will receive your stipulation at this time and your submission of the case.

Mr. Nossaman: What about briefs, your Honor?

The Court: Do you wish to make a brief statement of the issues in this case before you file the stipulation?

Mr. Nossaman: I should be glad to if your Honor wishes to take the time.

The Court: Yes.

Mr. Nossaman: I question whether it is necessary but if the Court prefers——

The Court: I would like to have a brief statement.

Opening Statement  
On Behalf of the Petitioner

Mr. Nossaman: It involves two items of deduction for the year 1942. The Petitioner is a Probate Estate. It is the Estate of Homer Laughlin, deceased, which is in the course of the administration in the Superior Court for Los Angeles County.

The controversy involves two items, both of them items of deduction or of exclusion.

The first item is \$1200.00 in amount and consists of a so-called annuity paid by the Estate to one Ella West during the year in question. The circumstances surrounding that I will briefly state as follows:

Homer Laughlin, whom I will designate as Homer Laughlin, Jr., to differentiate him from his father Homer Laughlin, Sr., who died in 1913, was, with his sister Gwendolyn, heir and legatee of his father's estate of a substantial amount.

Under his father's will, which was probated in 1913, as I recall it, one Ella West, designated as a niece in the will, was given the sum of \$100.00 per month during her life. Upon the death of Homer Laughlin, Sr. in 1913 his estate was probated and Homer Laughlin, Jr. was not only with his sister the legatee and heir of the estate, but was with her the executor. It was impossible, of course, to close the estate until some disposition had been made of this Ella West claim.

It was taken care of in the following manner: He entered into a contract with Ella West whereby he assigned to her \$1200.00 per year, \$100.00 per month, out of the rents to be received from the ground floor of the Laughlin Building, a building here in this city, which payments were to continue during the life of Ella West.

He obligated himself to make those payments, but the crux of it is that he assigned to her that sum out of the rentals to be received from the ground floor of that building. The estate was distributed in due course to Homer Laughlin, Jr. and his sister.

At about the time this contract was made with Ella West, Homer Laughlin purchased from his sister her interest in the Laughlin Building, so that from that time on he was the sole owner of the Laughlin Building.

Homer Laughlin died in 1932 and in the course of administration of his estate, of which Mr. Beach D. Lyon was and is the administrator with will annexed, a controversy arose between Ella West and the Estate as to what her rights were under this contract of August 1, 1921. She brought a suit for declaratory relief, making the estate and certain other parties, including the then lessee of the ground floor, parties defendant. The Court, in a judgment entered in 1933, decreed that she was entitled to \$100.00 per month out of the rentals to be received from the ground floor of the Laughlin Building during her life time. That is the status of the matter at the present time.

These sums were duly paid during the year 1942 as they have been throughout the period of administration of the estate. A deduction or an exclusion was claimed for these [26] payments upon the ground that Ella West had something in the nature of a rent charge or at any rate it is a property interest, property right in the ground floor of the Laughlin Building, represented by the amount of these agreed payments. And to that extent the payments do not belong to the Estate. On that theory they would be an exclusion, rather than a deduction.

We contend, however, if they are not an exclusion they are, under the circumstances, a proper deduc-



tion. The rents were collected by the Estate and it is shown by the stipulation that the rentals during the year 1944, from the ground floor of the Laughlin Building, the gross and net rentals were more than sufficient to pay this sum. That is the first item.

The other item is the sum of \$9600.00, which was paid to Ada Edwards Laughlin, a divorced wife of this decedent, Homer Laughlin, Jr., under the following circumstances:

On April 1, 1924, Homer Laughlin, Jr. entered into an agreement with his wife whereby he agreed to pay her the sum of \$800.00 per month during her life, for her support and maintenance. It was to be reduced to \$300.00 if she ever married, but that has not occurred.

That agreement was approved and confirmed by the Superior Court for this County in a suit for divorce which was instituted at almost that same time by Mrs. Laughlin [27] against Homer Laughlin.

Your Honor will recall that in the year 1942 Congress came to the relief of husbands who had been paying alimony and in Section 23-U of the Internal Revenue Code provided that sums paid under the circumstances of this case—I think I am perfectly justified in stating that—would be deductible by the husband and would be considered as income to the wife, upon which she would pay an income tax.

There could be no possible question of the deductibility of excludability—it makes no difference which—of these items on behalf of Homer Laughlin

if he were living. The sole question arises under a regulation which the Commissioner has seen fit to adopt and which we consider erroneous, to the effect the deduction or exclusion cannot be allowed to an estate; that is the question involved as to the \$9600.00 item.

The Court: Very well. Do you have any statement to make, Mr. Tonjes?

Mr. Tonjes: A brief one, your Honor.

Opening Statement  
On Behalf of the Respondent  
(By Mr. Tonjes)

Mr. Tonjes: Your Honor, I will state generally the position of the Respondent is, with respect to both the \$100.00 and the \$9600.00 payments, that neither one of them constitute proper exclusions from income and neither one of [28] them constitute a deduction from income because they don't constitute deductions because they are payments in satisfaction of an obligation of the Estate and therefore are not deductible from the income of the Estate.

The parties have signed a stipulation, your Honor, which sets forth all the facts upon which they both rely. I will file a copy of that with the Court and might I ask your Honor at this time that one of the exhibits, being a copy of the income tax return of the Trustee, that I have the privilege of withdrawing that and substituting a photostat copy for it?

The Court: That permission will be granted.

And the stipulation of facts will be received as the evidence in the case.

Do you wish to submit briefs under the rules? The rules permit either party to file their briefs within 45 days.

Mr. Tonjes: I think, your Honor, if it is acceptable to the Court, I would like the privilege of filing a reply brief. I think it might sharpen the issues a little bit if the petitioner files his opening brief and I reply to it. However, if the Court feels——

The Court: Usually where the facts are all stipulated we make the time for filing briefs, to file them simultaneously. If you desire the other method the Court has no objection.

Mr. Nossaman: It is immaterial to me, except I assume in that case I have the privilege of reply.

The Court: Yes, you will.

Mr. Nossaman: Very well. That is satisfactory.

The Court: The 45 days, I suppose, will be sufficient time for the petitioner to file his opening brief?

Mr. Nossaman: That will be ample.

The Court: Which will be July 25th, I believe. That will be 20 more days in June and 25 in July.

The respondent may have until August 25th in which to file his brief, and then you may have until September 15th in which to file an answering brief to the respondent's reply.

Mr. Nossaman: That will give us 20 days, your Honor?

The Court: Yes.

Mr. Nossaman: That will be satisfactory.

The Court: I had better give you 20. It is usually 15 in nearby points.

Mr. Nossaman: The transmission takes so long.

The Court: Yes. Very well. The time for filing briefs will be fixed as I have stated.

(Whereupon, at 11:30 o'clock a.m., Monday, June 10, 1946, the hearing in the above-entitled matter was colsed.)

[Endorsed]: Filed July 3, 1946. [30]

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[Title of Tax Court and Cause.]

### STIPULATION OF FACTS

It is hereby stipulated between the parties hereto, by their respective counsel, that the following facts shall be taken as true, without prejudice to the right of either party to introduce other evidence not inconsistent therewith:

(1) Petitioner is a probate estate in process of administration under the jurisdiction of the Superior Court of the State of California in and for the County of Los Angeles, being Probate Cause No. 132875 therein. The return of said estate for the taxable period here involved was filed with the Collector for the Sixth District of California on or before March 15, 1943.

(2) A copy of the notice of deficiency which occasioned the present proceeding is attached to the

petition [31] herein as Exhibit A and is hereby made part of this stipulation as Exhibit A.

(3) Homer Laughlin, Sr., father of Homer Laughlin, Jr., died on or about January 10, 1913, leaving a last will and testament dated August 30, 1909, duly admitted to probate on January 29, 1913, in the Superior Court of the State of California in and for the County of Los Angeles, in Probate Cause No. 22,692, which will contained among other provisions the following:

“Second: I give, devise and bequeath unto my nieces, Ella West and Nancy McIntosh, each the sum of one hundred dollars (\$100) per month, payable quarterly to each of them during their natural life.”

After certain other legacies, bequests and devises, the will gave the residue of the estate equally to decedent's son and daughter, Homer Laughlin, Jr. and Guendolyn Virginia Laughlin, further providing that Homer Laughlin, Jr. should hold Guendolyn's share in trust for her, distributing it to her, one-half at thirty years of age, one-half at forty, with remainders over if she died before distribution of her share. The will appointed Homer, Jr. and Guendolyn as executor and executrix without bond.

(4) On August 1, 1921, Homer Laughlin, Jr. and Ella West entered into a written agreement, a copy of which, omitting notarial acknowledgment, is attached to the petition herein as Exhibit B and is hereby made part of this stipulation [32] as Exhibit

B. The transaction evidenced by Exhibit B was entered into by Homer Laughlin, Jr. for the purpose of obtaining, and he did thereby obtain, her consent to distribution of the estate, which was made thereafter in due course, pursuant to court decree.

(5) The condition mentioned in the second paragraph of the August 1, 1921, agreement (Exhibit B) was duly complied with. In September, 1921, Ella West duly executed and delivered to Homer Laughlin, Jr. the release of the estate and the residuary legatees, copy of which release appears in Exhibit B, following the agreement therein set forth.

(6) The Laughlin Building, mentioned in Exhibit B, is a building situated at No. 315 South Broadway, Los Angeles, California. From about August 1, 1921, it was at all times the property of Homer Laughlin, Jr. He acquired a one-half interest in said building as a devisee under his father's will, and purchase the other half from his sister, Guendolyn, the funds for such purchase being obtained by the mortgage on said building to Metropolitan Life Insurance Company, which mortgage is referred to in Exhibit F. Homer Laughlin, Jr. died on or about December 27, 1932. The Laughlin Building was and is a part of his estate, the petitioner, which has been in process of administration in the Superior Court of the State of California in and for the County of Los Angeles since about February 4, 1933, on which date the will of Homer Laughlin, Jr. was duly admitted to probate, and Beach D. [33] Lyon was appointed, and at all times

since has been and is now, the duly appointed, qualified and acting administrator with the will annexed of said estate.

(7) In May, 1933, a dispute having arisen between Ella West on the one hand and the Estate of Homer Laughlin, Jr., deceased, on the other, as to her rights under the contract and assignment of August 1, 1921, a suit for declaratory relief was brought by Ella West in the Superior Court of the State of California in and for the County of Los Angeles, Ella West vs. Beach D. Lyon, et al, No. 356,776, that court having jurisdiction of the parties and of the subject matter, to which suit all persons having any interest in the subject matter were made parties. Copy of the complaint in said action (except that the verification, also the August 1, 1921 agreement, Exhibit B hereto, is omitted as indicated in the attached copy) is hereto attached marked Exhibit C. Copy (omitting verification) of the defendant Administrator's answer in said suit is hereto annexed, marked Exhibit D. On the 28th day of June, 1933, the Court in the declaratory relief suit, made its judgment determining the issues between plaintiff and certain defendants. Copy of this judgment is hereto attached, marked Exhibit E. On July 7, 1933, the court made a further judgment in said suit, determining the issues between plaintiff and the remaining defendants. Copy of this judgment is hereto attached, marked Exhibit E-1. Neither of said judgments has ever been appealed from, [34] reversed or modified, and both judg-

ments remain at date hereof in full force and effect.

(8) During the taxable year 1942, petitioner paid to Ella West the sum of \$1,200, pursuant to the agreement of August 1, 1921, between Homer Laughlin, Jr. and Ella West (Exhibit B) and the Superior Court judgment of June 28, 1933 (Exhibit E). This sum was paid out of rentals received by petitioner from the ground floor of the Laughlin Building during that year. The gross and net rentals received by petitioner from that source for and during the taxable year 1942 were greatly in excess of the sum of \$1,200. The lease to Grand Central Public Market, Inc., referred to in Exhibit E-1, had terminated on October 31, 1939, and said corporation was not in possession of the ground floor of the Laughlin Building after about that date. After the termination of said lease on October 31, 1939, and at all times subsequent thereto until after December 31, 1942, petitioner as lessor from time to time leased the ground floor of the Laughlin Building, formerly leased to Grand Central Public Market, Inc., to various persons who conducted the business of a public market therein. In negotiating and executing said leases, Ella West was not consulted, nor did she in any manner participate therein.

(9) In the federal estate tax return, Form 706, filed by the Estate of Homer Laughlin, the petitioner's [35] decedent, there was claimed under Schedule I, entitled "Debts of Decedent," the following item:



“Ella West (\$100 per mo. Expectancy 11 years.) \$16,610.00” In the final determination of decedant’s estate tax liability the Ella West claim was allowed as a deduction in the total amount of \$9,194.05, such amount being the present value at the date of decedent’s death of an annuity of \$100 per month payable during the expected life of Ella West, who was then sixty-six years of age.

(10) On or about April 1, 1924, Homer Laughlin and his then wife, Ada Edwards Laughlin, entered into a property settlement agreement, which agreement was approved and confirmed in an interlocutory decree of divorce between those parties dated September 24, 1924, in Cause No. D28768 in the Superior Court of the State of California in and for the County of Los Angeles, and in a final decree duly made September 29, 1925, pursuant thereto. Copy of the property settlement agreement of April 1, 1924, is hereto attached, marked Exhibit F. A copy of the decrees of divorce (interlocutory and final) in Cause No. D28768 in so far as they pertain to the matters and things hereinabove mentioned, is hereto attached as Exhibit G. During his lifetime, Homer Laughlin made to Ada Edwards Laughlin the payments of \$800 per month which he agreed to make in the agreement of April 1, 1924.

(11) Ada Edwards Laughlin is living at date hereof and has never remarried. The Homer Laughlin Building, referred to in Exhibit F (referred to in Exhibit B as the Laughlin Building) was not sold by Homer Laughlin, Jr., nor has it been sold

by his estate. The trust fund referred to in Paragraph (9) of Exhibit F has never been established, nor has the insurance policy therein referred to, guaranteeing Homer Laughlin, Jr.'s performance of the terms of the April 1, 1924, agreement (Exhibit F), ever been furnished.

(12) During the taxable year 1942, petitioner paid to Ada Edwards Laughlin the sum of \$9,600 (\$800 per month) pursuant to the agreement of April 1, 1924, between Homer Laughlin, Jr. and Ada Edwards Laughlin (Exhibit F) and the court decrees (interlocutory and final) in the divorce action of Laughlin v. Laughlin (Exhibit G).

(13) In Schedule I, "Debts of Decedent," of the federal estate tax return of the Estate of Homer Laughlin, Jr., deceased, the following item was claimed as a deduction:

"Indebtedness in favor of Ada Edwards Laughlin, in pursuance of Property Settlement, dated April 1, 1924, approved by Decree of Superior Court of the State of California, in and for the County of Los Angeles, and secured as a lien on the building, subject to Trust Deed in favor of Metropolitan Life Insurance Co. (To return \$9600.00) Expectancy 16 years, \$152,480.00."

In the first audit of the return, this item was reduced by the Commissioner to \$101,259.35. It was later [37] eliminated by the Commissioner as a deduction in the manner hereinafter set forth.

In said return, certain expenses were claimed as deductions, as follows: Attorneys' fees, \$12,026.36; miscellaneous administration expenses, \$23.55. These items were allowed by the Commissioner, in his first examination of the return, in the respective amounts of \$11,152.59 and \$790.55. Certain items of expense, namely, attorneys' fees and miscellaneous administration expenses, were incurred after the first examination of the return.

Petitioner on October 22, 1938, filed claim for refund in the amount of \$2,500 on account of such omitted expense items. The Commissioner adjusted the amounts theretofore claimed and allowed on account of attorneys' fees and miscellaneous administration expenses the respective amounts of \$18,027.48 and \$1,065.66, and made an adjustment for additional debts shown to have been owing by the decedent, but rejected the claim for refund for the assigned reason that the above amount, \$101,259.35, representing decedent's liability on the separation agreement of April 1, 1924 (Exhibit F) had been erroneously included as a deduction in the prior determination of the estate tax liability. Copy of the Commissioner's letter of October 25, 1939, rejecting the refund claim, is hereto attached, marked Exhibit H. Petitioner has begun no action to recover on the rejected [38] claim, and any such action is now barred by the statute of limitations. Respondent has not made or attempted to make any additional assessment in respect of the claimed erroneous allowance of the deduction based on the April 1, 1924, agreement.

(14) Attached hereto as Exhibit I is copy of petitioner's 1942 income tax return.

(15) Homer Laughlin, Jr. did not possess on April 1, 1924, or at any time thereafter during the continuance of the marriage between him and Ada Edwards Laughlin, any substantial amount of community property, his property consisting of property given to him by or inherited by him from his father, Homer Laughlin, Sr.

Dated: June 5, 1946.

/s/ W. L. NOSSAMAN,  
Counsel for Petitioner.

/s/ J. P. WENCHELL, ECC  
Chief Counsel, Bureau of  
Internal Revenue, Counsel  
for Respondent. [39]

EXHIBIT C

In the Superior Court of the State of California  
in and for the County of Los Angeles

No. 356776

ELLA WEST,

Plaintiff,

vs.

BEACH D. LYON, BEACH D. LYON as Administrator with the Will Annexed of the Estate of Homer Laughlin, Deceased, GRAND CENTRAL PUBLIC MARKET, INC., a California corporation, JOHN DOE ONE, JOHN DOE TWO, CITIZENS NATIONAL TRUST AND SAVINGS BANK OF LOS ANGELES, a national banking association, as Trustee, JOHN CORPORATION, a corporation, JANE DOE ONE, JANE DOE TWO, JOHN ROE CORPORATION, a corporation, as Trustee,

Defendants.

COMPLAINT FOR DECLARATORY RELIEF

Comes now the plaintiff above named and for cause of action against the defendants alleges as follows:

I.

That the defendant Grand Central Market, Inc., is now and at all times mentioned herein was a corporation duly organized and existing under and by virtue of the laws of the State of California;

that the defendant Citizens National Trust and Savings Bank of Los Angeles is a national banking association duly organized and existing under and by virtue of the laws of the United States of America; that the defendants John Corporation, a corporation, and John Roe Corporation, a corporation, are corporations [40] duly organized and existing; and that Homer Laughlin, also known as Homer Laughlin, Jr., who were one and the same persons, died testate on or about the 27th day of December, 1932, in the County of Los Angeles, State of California, and that at the time of his death he was a resident of the County of Los Angeles, State of California, and left an estate therein; that the will of Homer Laughlin was thereafter duly and regularly admitted to probate by order of the Superior Court of said Los Angeles County, and that on or about the 4th day of February, 1933, the defendant Beach D. Lyon was duly and regularly appointed as Administrator with the Will Annexed of his estate; that thereafter said Beach D. Lyon duly qualified as such Administrator with the Will Annexed, and that the defendant Beach D. Lyon is now the duly appointed, qualified and acting Administrator with the Will Annexed of the Estate of said Homer Laughlin, Deceased, and that his letters have not been revoked.

## II.

That on or about the 1st day of August, 1921, and for a considerable period of time theretofore, Homer Laughlin, Jr., was the owner of the building

known as the Laughlin Building, and the owner of the Lessor's interest in a lease of the Ground Floor of said Laughlin Building, wherein the defendant Grand Central Public Market, Inc., was named the Lessee. That said lease is still in existence, and, according to its terms and the terms [41] of a renewal thereof, will continue until the first day of November, 1939. That the rents specified and reserved in said lease to be paid by Lessee to the Lessor exceeds the sum of One Hundred Dollars (\$100.00) per month.

### III.

That on or about the 1st day of August, 1921, the plaintiff, Ella West, released the said Homer Laughlin, Jr., as Trustee, and all of the property comprising the estate of Homer Laughlin, Sr., deceased, from the payment of an annuity provided for in the will and in the decree of distribution entered in the estate of said Homer Laughlin, Sr., deceased, in consideration of said Homer Laughlin, Jr., assigning to this plaintiff the sum of \$100.00 per month of the rental to be paid by the Lessee of the Ground Floor of the Laughlin Building, and in consideration of said Homer Laughlin, Jr., agreeing to pay said sum of \$100.00 per month during the remainder of the natural life of this plaintiff, a copy of which agreement is in the following words and figures, to wit:

[Here is inserted agreement of August 1, 1921, between Homer Laughlin, Jr., and Ella West, which agreement is Exhibit B.]

## IV.

That thereafter and on or about the 26th day of August, 1921, Homer Laughlin, Jr., made, executed and delivered to the Grand Central Public Market, Inc., an order to pay \$100.00 per [42] month to Ella West during her natural life, from the rent reserved in the lease heretofore referred to, a copy of which order is in the following words and figures, to wit:

“Los Angeles, California.

August 26th, 1921.

Grand Central Public Market, Inc.

You are hereby authorized and directed to pay, as long as your lease on the premises Lots A and B Homer Laughlin Subdivision of Block 8, Ord's Survey, is in force, to Nancy L. West the sum of \$150.00 per month during her natural life, and to Ella West the sum of \$100.00 per month during her natural life, the said payments to be made from the rents due me and are to be deducted by you from the lease moneys monthly, said payment to begin on the 1st day of October, 1921.

HOMER LAUGHLIN, JR.

Duplicate

Accepted:

GRAND CENTRAL PUBLIC  
MARKET, INC.

By E. E. SELLERS

President

By U. G. PURINTON

Secretary

(Corporation Seal)''



and that thereafter the defendant Grand Central Public Market, Inc., accepted said order and agreed to pay said sum of \$100.00 per month from the rental due to Homer Laughlin, or his assignee or successors in interest, to this plaintiff, and that thereafter and up to and including the 1st day of December, 1932, [43] the defendant Grand Central Public Market, Inc., paid or caused to be paid to this plaintiff the sum of \$100.00 per month, said sum of \$100.00 being part of the rental due the Lessor under said lease for the use of the ground floor of the Homer Laughlin Building; that from and after the first day of December, 1932, the defendants and each of them refused to pay this plaintiff the said sum of \$100.00 per month, in accordance with the terms of the said agreements hereinbefore set forth.

## V.

That an actual controversy relating to the legal rights and duties of the respective parties in interest to the agreements hereinbefore set forth and in and to the payment of said sum of \$100.00 per month assigned by said Homer Laughlin to this plaintiff has arisen in the following particulars, to wit: That the defendant Grand Central Public Market, Inc., has refused and still refuses to pay the said sum of \$100.00 per month so assigned to this plaintiff in accordance with the second agreement set forth in paragraph IV hereof. That the defendant Beach D. Lyon and the defendant Beach D. Lyon as Administrator with the Will Annexed

of the Estate of Homer Laughlin, Deceased, claims that said sum of \$100.00 per month so assigned by said Homer Laughlin from the tenant in possession of the Ground Floor of the Laughlin Building constitutes an asset of the estate of Homer Laughlin, Jr., and that he as Administrator with the Will Annexed of the Estate of Homer Laughlin, Deceased, is entitled to collect all of the rent [44] due from the Grand Central Public Market, Inc., the tenant of the Ground Floor of the Laughlin Building. That the defendants, John Doe One, John Doe Two, Citizens National Trust and Savings Bank of Los Angeles, a national banking association, as Trustee, John Corporation, a corporation, Jane Doe One, Jane Doe Two, and John Roe Corporation, a corporation, as Trustee, claim some right, title or interest in or to said sum of \$100.00 per month so assigned by Homer Laughlin to this plaintiff from the tenant in possession of the Ground Floor of the Laughlin Building.

Wherefore, Plaintiff prays that she may have a judgment declaring that on or about the 26th day of August, 1921, Homer Laughlin, also known as Homer Laughlin, Jr., assigned to this plaintiff \$100.00 per month during the remainder of her natural life from the rentals due from the tenant in possession of the Ground Floor of the Laughlin Building, and that it be further decreed that the defendant Grand Central Public Market, Inc., be compelled to pay to this plaintiff the sum of \$100.00 per month during her natural life as long as it remains in possession of the Ground Floor of the

Laughlin Building, and that it be further decreed that the defendants Beach D. Lyon and Beach D. Lyon as Administrator with the Will Annexed of the Estate of Homer Laughlin, Deceased, and Citizens National Trust and Savings Bank of Los Angeles, a national banking association, as Trustee, have no right, title or interest in or to said sum of \$100.00 per month so assigned to this plaintiff, and for her costs of suit [45] incurred herein and for such other and further relief as the Court may deem just and equitable.

SALISBURY & ROBINSON

By W. B. DENNIS

Attorneys for Plaintiff

[Verification by Ella West] [46]

## EXHIBIT D

In the Superior Court of the State of California,  
in and for the County of Los Angeles

No. 356776

ELLA WEST,

Plaintiff,

vs.

BEACH D. LYON, BEACH D. LYON as Administrator with the Will Annexed of the Estate of Homer Laughlin, Deceased, GRAND CENTRAL PUBLIC MARKET, INC., a California Corporation, JOHN DOE ONE, JOHN DOE TWO, CITIZENS NATIONAL TRUST AND SAVINGS BANK OF LOS ANGELES, a national banking association, as Trustee, JOHN CORPORATION, a corporation, JANE DOE ONE, JANE DOE TWO, JOHN ROE CORPORATION, a corporation, as Trustee,

Defendants.

ANSWER OF DEFENDANT BEACH D. LYON,  
AND BEACH D. LYON AS ADMINISTRATOR  
WITH THE WILL ANNEXED OF  
THE ESTATE OF HOMER LAUGHLIN,  
DECEASED.

Comes now the defendant Beach D. Lyon, and  
Beach D. Lyon as Administrator with the Will

Annexed of the Estate of Homer Laughlin, Deceased, and answering the complaint herein, admits, denies and alleges as follows:

I.

This defendant admits the truth of the allegations contained in Paragraphs I, II, III, IV and V of said complaint.

II.

This defendant alleges that no claim has been presented by the plaintiff as a creditor of said estate, and the time for presenting [47] claims has not expired and will not expire until on or about August 6, 1933.

III.

That various creditors have presented claims against said estate aggregating a large amount, and one of said claims is a preferred claim in a large sum, and has priority over claims of ordinary creditors.

That this defendant, as administrator with the will annexed of said estate, cannot pay any of said claims until an order of the Superior Court of the State of California, in and for the County of Los Angeles, having jurisdiction of said estate, shall, in the due course of administration of said estate, determine the priority of said claims and the proportions or amounts to which the creditors may be

entitled, and authorize this administrator to make payments in accordance with such order that may be so given.

Wherefore, this defendant prays that no costs be recovered by plaintiff against this defendant, either personally or as administrator with the will annexed of the Estate of Homer Laughlin, Deceased, and that the controversy existing between plaintiff and defendant may be determined by decree of this Court.

RUSS AVERY

Attorney for Defendant Beach D. Lyon, Individually, and Beach D. Lyon, as Administrator with the Will Annexed of the Estate of Homer Laughlin, Deceased.

[Verification by Beach D. Lyon.] [48]

EXHIBIT E

In the Superior Court of the State of California  
in and for the County of Los Angeles

No. 356,776

ELLA WEST,

Plaintiff,

vs.

BEACH D. LYON, BEACH D. LYON, as Ad-  
ministrator with the Will annexed of the estate  
of Homer Laughlin, deceased, et al.,

Defendants.

JUDGMENT

This cause came on regularly for trial on the 26th day of May, 1933, in Department 17 of the above entitled Court, Salisbury & Robinson, by W. B. Dennis, Esq., appearing as counsel for the plaintiff, and Russ Avery, Esq., appearing as counsel for the defendants, Beach D. Lyon, and Beach D. Lyon as Administrator with the Will annexed of the estate of Homer Laughlin, before the Court sitting without a jury, and it appearing that the defendants admitted all of the facts set forth in plaintiff's complaint, the cause was argued by counsel for the respective parties, and after due deliberation thereon the Court ordered that judgment be entered accordingly in favor of the plaintiff, Ella West.

Whereupon, the defendants waived notice of written findings of fact and conclusions of law. [49]

Now, Therefore, by Virtue of the Premises It Is Hereby Ordered, Adjudged, and Decreed that on the 1st day of August, 1921, Homer Laughlin assigned to the plaintiff Ella West One Hundred (\$100) Dollars of the monthly rental due or to become due from the lessee of the ground floor of the Laughlin Building, which sum was to be paid to the plaintiff Ella West each month during the remainder of her natural life; that from and after said 1st day of August, 1921, Homer Laughlin had no right, title, or interest in and to said sum of One Hundred (\$100) Dollars so assigned to this plaintiff; that the defendants Beach D. Lyon, and Beach D. Lyon as Administrator with the Will annexed of the estate of Homer Laughlin, have no right, title, or interest in and to the said sum of One Hundred (\$100) Dollars of the monthly rental due or to become due from the lessee of the ground floor of the Laughlin Building, which sum of One Hundred (\$100) Dollars was to be paid to the plaintiff, Ella West, each month during the remainder of her natural life, and which sum was assigned by Homer Laughlin to plaintiff.

Dated this 28th day of June, 1933.

LEONARD SLOSSOM

Judge of the Superior Court.



EXHIBIT E-1

In the Superior Court of the State of California  
in and for the County of Los Angeles

No. 356,776

ELLA WEST,

Plaintiff,

vs.

BEACH D. LYON, BEACH D. LYON, as Administrator with the Will Annexed of the Estate of Homer Laughlin, Deceased, Grand Central Public Market, Inc., a California corporation, Citizens National Trust and Savings Bank of Los Angeles, a national banking association, as Trustee, et al.,

Defendants.

JUDGMENT

It appearing from the records that the defendants Grand Central Public Market, Inc., a California corporation, and Citizens National Trust and Savings Bank of Los Angeles, a national banking association, as Trustee, were duly served with a copy of the Summons and Complaint in the above entitled action, and having failed to appear or plead in this cause within the time allowed by law, and the default of said defendants, Grand Central Public Market, Inc., a California corporation, and Citizens National Trust and Savings Bank of Los Angeles, a National banking association, as Trustee, having been duly and regularly entered, the above

entitled action came on for hearing on the 7th day of July, 1933, at the hour of 2:00 o'clock p.m., before the Court, sitting without a jury, plaintiff appearing by the firm of Salisbury & Robinson, her attorneys, and no one appearing for the defendants; and the testimony of witnesses and documentary evidence having been offered on the part of the plaintiff, and the Court having entered judgment in favor of the plaintiff and against the defendants, Grand Central Public Market, Inc., a California corporation, and Citizens National Trust and [51] Savings Bank of Los Angeles, a national banking association, as Trustee;

Now, Therefore, by virtue of the premises aforesaid and the law,

It Is Ordered, Adjudged and Decreed that on the 1st day of August, 1921, Homer Laughlin for valuable consideration assigned to the plaintiff herein, Ella West, for the remainder of her natural life, the sum of \$100.00 per month, said sum to be paid from the rent due from the tenant in possession of the ground floor of the Laughlin Building;

And It Is Further Ordered, Adjudged and Decreed that defendant Grand Central Public Market, Inc., be and it is hereby ordered and authorized to pay to this plaintiff the sum of \$100.00 per month during the natural life of said plaintiff so long as said Grand Central Public Market, Inc., remains in possession of the ground floor of the Laughlin Building, or so long as it is obligated on any lease of the ground floor of the Laughlin Building.

And It Is Further Ordered, Adjudged and Decreed that the defendant Citizens National Trust

and Savings Bank of Los Angeles, a national banking association, as Trustee, and the defendant Grand Central Public Market, Inc., a corporation, have no right, title or interest in or to said sum of \$100.00 per month so assigned by Homer Laughlin to Ella West.

And It Is Further Ordered, Adjudged and Decreed that the defendant Citizens National Trust and Savings Bank of Los Angeles, a national banking association, as Trustee, be and it is hereby ordered to pay over to plaintiff any and all sums of money collected by said Bank from the tenant in possession of the ground floor of the Laughlin Building which were so assigned to this plaintiff.

Dated this 7th day of July, 1933.

/s/ MARSHALL F. McCOMB

Judge of the Superior Court.

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## EXHIBIT F

### AGREEMENT HOMER LAUGHLIN and ADA EDWARDS LAUGHLIN

[Stamped]: Received for record Jan. 21, 1925, 10 a.m. Received of Homer Laughlin. Copied in Book 625 of Deeds, Page 462, Records of Riverside County, California, F. E. Dinomore, Recorder. Fee \$4.00 —36. Compared J. W. Keterick, Reimer, Deputy.

[Pencil notation]: Return to Homer Laughlin, 602 Homer Laughlin Bldg., Los Angeles, Cal.

This Agreement made and entered into this 1st

day of April, 1924, by, and between Homer Laughlin, the party of the first part, and Ada Edwards Laughlin, his wife, party of the second part, both of the City of Los Angeles, California,

Witnesseth:

Whereas, the parties to this agreement have been living separate and apart since on or about the 25th day of February, 1923, and desire to settle their property rights by this agreement, and it being their purpose by said agreement to determine all the rights of property existing between themselves, and to define the terms and conditions upon which each releases all right, title, interest and claim in, to or against property of the other, whether such property now exists or may hereafter be acquired;

Now Therefore, it is agreed by and between the parties hereto as follows:

1. The party of the first part covenants and agrees to pay to the party of the second part for her support and maintenance the sum of Eight Hundred Dollars (\$800) per month during the term of her natural life; provided, however, that if the parties hereto should be divorced at any time in the future, and in such event the party of the second part should remarry, said monthly payments shall be reduced to the sum of Three Hundred Dollars (\$300) per month. The said payments shall be made in cash, lawful money of the United States, beginning on the first day of May, 1924, and shall be made each month thereafter at the city of Los Angeles, California, on or before the 15th day of each succeeding month.

2. The party of the first part agrees also to transfer all his right, title and interest in and to that certain Stearns-Knight Brougham automobile heretofore purchased by the party of the first part for the party of the second part, and now in the possession of the party of the second part, and that he will pay or cause to be paid the entire purchase price for the said automobile, so that the title, free and clear of all encumbrances, may be vested in the party of the second part, as her separate property.

3. The party of the first part covenants and agrees to immediately execute and deliver to the party of the second part a quit-claim deed, quit-claiming to the second party, as her separate estate, all his right, title [54] and interest in and to the residence property located at No. 666 West Twenty-eighth Street in the city of Los Angeles, state of California, and more particularly described as follows, to-wit:

The southeasterly 39 feet of lot 30, all of lot 31 and the northwesterly 5 feet of lot 32, all in block "B" of the Wheeler Tract, as per map record in Book 10 at page 25 of Miscellaneous Records of said Los Angeles County.

The party of the first part further covenants and agrees to pay, or cause to be paid, on or before maturity, that certain promissory note for the sum of Eighteen Thousand Dollars, executed by the parties hereto, in favor of Flora Griffin, and secured by a mortgage on the last described property, which mortgage is recorded in Book 254 at Page 106 of

Official Records, records of Los Angeles County, and to fully discharge and satisfy said mortgage; and until the satisfaction of said mortgage, the party of the first part covenants and agrees to pay all interest when and as it becomes due upon said last named indebtedness, and to prevent any foreclosure of said mortgage; and he further covenants and agrees that until the satisfaction of said mortgage he will pay all of the taxes levied upon said last named property and all fire insurance on said premises, but when said mortgage shall have been fully satisfied of record, his obligation to pay said taxes and insurance shall thereupon cease.

4. All of the furniture, paintings, bric-a-brac, books, gardening tools, ornaments, automobile supplies, and other articles of personal property now in or about the residence and surrounding premises of the second party at No. 666 West Twenty-eighth Street, Los Angeles, California, excepting the Chinese porcelains and all other works of art purchased in the Orient, shall be and remain the property of the second part, excepting also the following articles which shall be and remain the property of the first party, viz.:

Paintings:

- 1 Norini (Subject)
- 1 Wachtel (Subject)
- 1 Wachtel (Subject)
- 1 portrait of the father and mother of first party;
- The jewelry of the first party;

1 table lamp standard, formerly in the residence of the father of the first party;

The technical books of the first party;

1 brass sun dial;

Books containing the messages of the Presidents of the United States. [55]

As to the Chinese porcelains and said works of art purchased in the Orient, each party shall first choose one of said porcelains or works of art, the first choice to be determined by lot; thereafter the first party shall choose two, then the second party shall choose one, and so on, the first party choosing two and the second party one, until they are all chosen. Those chosen by each party shall be and remain his or her separate property. Each party agrees to immediately execute and deliver to the other a bill of sale for his or her respective personal property as above designated, or, as to the Chinese porcelains and the said works of art, as they may be chosen. The party of the first part agrees to transfer to the second party all unexpired policies of insurance on said property designated as hers or to be hers, also on said Stearns-Knight Brougham, in such manner that in case of the happening of fire or other peril insured against, the benefits of said policies will accrue to the second party.

5. In consideration of the performance of all the terms and conditions of this agreement by the party of the first part, and especially the payment of said monthly sum of \$800.00, the party of the second part covenants and agrees that she will hold the

first party free and clear of any and all liabilities for debts or obligations incurred by her from and after the date hereof, and will pay all bills and indebtedness which may be incurred by her since said 25th day of February, 1923, of all kinds and description, except the following, which the party of the first part agrees to pay, viz.: The sum of \$150.00, balance due on membership in the Women's Athletic Club, and \$100.00 due for dentistry to Dr. E. E. Kirtlan; also the sum of \$1,500.00 to Overton, Lyman & Plumb on account of their legal services to the second party in connection with the effecting of this property settlement.

6. The party of the first part hereby remises, releases and relinquishes and forever quitclaims to the said party of the second part, all right, title and interest which he has or might claim in and to all of the property, real and personal, held or owned by her, or in which she may have any interest, vested or contingent, and wheresoever situated, and all such property, both real and personal, as she may hereafter in any manner acquire, [56] and also renounces and releases any and all right to inherit any portion of her estate in case of her death, and any right to administer upon her estate in that event or to claim an allowance from her estate or a probate interest therein; also all right and claim of right to receive her earnings, if any, hereafter to accrue; and all right to support by her in any contingency under the provisions of Section 176 of the Civil Code of California, or any other law of this state or other state or country.



7. The said party of the second part does hereby release, remise and forever quit-claim unto the said party of the first part any and all right, title and interest which she has or might or could claim or assert as his wife, or otherwise, in and to all or any of his property. real or personal, held or owned by him or in which he has any interest, either vested or contingent, and including all or any property he may hereafter in any manner acquire, and where-soever situated, and whether the same be separate or community property, and including also the earnings and income of the said party of the first part now accrued or hereafter to accrue to him, except the rights and interests reserved and expressly provided for by the terms and conditions of this contract, which rights are hereby expressly reserved; and the said party of the second part does also relinquish and release to the party of the first part any and all rights and claims which she has or might or could assert to support and maintenance or alimony of any nature, and for any time, whether in the course of judicial proceedings between the said parties, or otherwise, including the items of attorneys' fees and costs in any such judicial proceeding; and she renounces, quit-claims and relinquishes all rights which she has, or could assert against the party of the first part for support as his wife, other than or in addition to the payments to be made to her by him, as above provided, and the property to be conveyed by him to or for her, as above provided. The party of the second part also releases, renounces and relinquishes all right and claim

which she has or might have to any share in the estate of the said party of the first part in case of his decease, and to inherit from him in the state of California, or elsewhere, including her community property rights, if any, and the right to dower in any property of the said party of the first part; and also renounces and relinquishes all right to administer upon his estate in case of his death, and her right to an allowance from his estate of any kind or nature whatsoever, excepting the payments and the property rights herein provided for.

8. The parties hereto mutually agree that each of them, respectively, will execute all such deeds, assignments, transfers, documents or instruments as may be presented to him or her by the other and which may be reasonably necessary or convenient to enable either of them to alienate, transfer, mortgage or hypothecate his or her property, respectively, in accordance with the terms and conditions of this agreement; provided, however, that nothing in this paragraph shall be construed as obligating the party of the second part to execute any document or instrument which may have the effect of depriving her of any rights or property which by this agreement she is entitled to; provided, further, that neither of the parties hereto shall be required by the other to sign any instrument not provided for in this contract which will in any manner render the one so required to sign liable for the payment of any money or the performance of any act, or the incurring of any liability in the nature of a warranty, or otherwise.

9. In order to secure the faithful performance of the terms and conditions of this agreement, the party of the first part covenants and agrees that that certain real estate, together with the improvements thereon, known as the "Homer Laughlin Building," located between Third and Fourth Streets, on the west side of Broadway, in the city of Los Angeles, state of California, shall be and is hereby hypothecated as security for the faithful performance of all of the terms and conditions of this agreement, and especially for the payment of the said monthly installments of \$800 each, and of the mortgage lien now existing upon the residence located at No. 666 West 28th Street above described, which said Homer Laughlin Building is more particularly described as follows, to-wit: [58]

Lots "A" and "B" of Homer Laughlin Sub-division of Block Eight (8), Ord's Survey, in the city of Los Angeles, county of Los Angeles, state of California, as per map thereof recorded in Book 83 at Page 41 of Miscellaneous Records in the office of the County Recorder of said county.

And the said party of the first part covenants and agrees that if at any time while this contract is in force he shall sell the said Homer Laughlin Building, he will, coincident with said sale, deposit with a trust company, mutually satisfactory to the parties to this agreement, doing business in the city of Los Angeles, California, the sum of One Hundred Fifty Thousand Dollars (\$150,000) which shall be invested in securities mutually satisfactory to the

parties to this agreement, which trust fund shall stand as security for the faithful performance of all the terms and conditions of this agreement in lieu of the said Homer Laughlin Building; the said trust fund and the income therefrom to be subject to the disposition of the party of the first part, provided he is not in default under the terms hereof, subject, however, to the right of the party of the second part to have said trust fund at all times to remain intact and of the actual market value of the sum of \$150,000.00, as security for the faithful performance of the terms and conditions of this agreement by the party of the first part to be done and performed; and the said party of the first part covenants and agrees at all times during the existence of this agreement to keep said trust fund of the actual market value of the sum of \$150,000 for the purposes herein stated. The said trust shall provide that should the party of the first part be in default at any time or times in the payment or payments to be made to the second party under the terms hereof, the trustee of said fund shall immediately upon such default, pay out of the interest of the said trust fund, if the interest is sufficient, but if not, then out of the principal thereof, such sum as may be necessary to cure said default, or defaults, it begin the intention of the parties hereto that said trust shall be so created that the party of the second part shall always be assured of receiving the monthly payments herein provided for. If, without the sale of the said Homer Laughlin Building property, the party of the first part shall, at any time, create a trust fund of \$150,000.00, in cash, or shall deposit

approved securities with said trustee, of the actual market value of \$150,000.00, and thereby create a trust upon the same terms and conditions as above set forth, or shall furnish to the party of the [59] second part an insurance policy, issued by a responsible corporation mutually satisfactory to the parties to this agreement, guaranteeing the performance of the terms of this agreement by the party of the first part, the party of the second part covenants and agrees to release the said Homer Laughlin Building property from the lien or obligation of this contract.

10. It is understood and agreed by and between the parties hereto that the said Homer Laughlin Building is now subject to a first mortgage to secure an indebtedness of \$600,000.00 in favor of the Metropolitan Life Insurance Company, and the hypothecation of said building as security for the faithful performance of the terms and conditions of this agreement is subject to said prior indebtedness

It is further covenanted and agreed by and between the parties hereto that if it becomes necessary at any time during the existence of this agreement to increase the indebtedness upon the said Homer Laughlin Building property, the said prior indebtedness may be increased to a sum not to exceed an aggregate of \$650,000.00, and the party of the second part covenants and agrees that if the party of the first part should desire to increase said prior indebtedness to a sum not to exceed the said amount of \$650,000.00, she consents that he may do so, hereby consenting thereto, and will execute and

deliver to the party of the first part or to any person or corporation named by him, any document necessary or proper in order to consent to the increase of said prior indebtedness upon the said Homer Laughlin Building property to an amount not exceeding at any one time the sum of \$650,000.00, and bearing interest at a rate not to exceed seven per cent per annum.

It is covenanted and agreed by and between the parties hereto that if a divorce should be granted upon the complaint of either party to this agreement, and thereafter the party of the second part should marry some person other than the party of the first part, the obligation herein contained to pay to her the monthly installment of \$800.00 during the term of her natural life shall immediately terminate as to \$500.00 thereof, and upon such contingency, but not otherwise, the party of the second part covenants and agrees to release the party of the first part from all further obligations to make any monthly payment in excess of \$300.00, and will [60] execute any and all documents that may be necessary to release any of the property of the party of the first part, and especially the Homer Laughlin Building property from the lien created by this agreement, to secure the faithful performance of the terms and conditions thereof by the party of the first part; it being particularly understood that the monthly payments of \$300.00 per month, after the remarriage of the said second party, shall not be secured by any lien on the property of the first party, but shall remain only a personal obligation as to said \$300 per month. The

payments herein provided to be made by the party of the first part to the party of the second part shall survive the death of the party of the first part and shall be binding upon his estate.

11. In the event a divorce should be granted to either party to this agreement, it is stipulated and agreed that the terms of this contract may be, at the option of either party, included in any interlocutory or final decree that may be entered in such action, if any such action is commenced or prosecuted.

In Witness Whereof the parties hereto have executed this agreement, in duplicate, the day and year first above written.

/s/ HOMER LAUGHLIN,  
Party of the First Part.

/s/ ADA EDWARDS LAUGHLIN,  
Party of the Second Part.

State of California,  
County of Los Angeles—ss.

On the 20th day of January in the year 1925 before me, J. C. Laderize, a Notary Public in and for said County, residing therein, duly commissioned and sworn, personally appeared Homer Laughlin, personally known to me as the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same. In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

J. C. LEDERIZE.

State of California,  
County of Los Angeles—ss.

On this 8th day of April, 1924, before me, Jessie McDill, a Notary Public in and for said county and state, residing therein, duly commissioned and sworn, personally appeared Homer Laughlin, known to me to be the person whose name is subscribed to the foregoing agreement, and acknowledged to me that he executed the same.

[Seal] JESSIE McDILL,

Notary Public in and for the County of Los Angeles,  
State of California.

State of California,  
County of Los Angeles—ss.

On this 10th day of April in the year one thousand, nine hundred and twenty-four, A.D., before me, John DeFerie, a Notary Public in and for said County, residing therein, duly commissioned and sworn, personally appeared Ada Edwards Laughlin, personally known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] /s/ JOHN DeFERIE,

Notary Public in and for the County of Los Angeles,  
State of California.

My commission expires April 11, 1927.



EXHIBIT G

Ada E. Laughlin vs. Homer Laughlin

D 28,768

Filed 1924. April 15, 1924.

Order of default May 9, 1924

Interlocutory Judgment of Divorce, made September 24, 1924, entered September 26, 1924:

After preliminary recitals:

“The Court finds that all of the allegations contained in the complaint are true, and that a divorce ought to be granted as prayed for in said complaint. That on the first of April, 1924, plaintiff and defendant entered into a property settlement agreement, by the terms of which all property rights, and maintenance of the plaintiff were determined and agreed upon,

“Wherefore, it is hereby Ordered, Adjudged and Decreed that the plaintiff is entitled to a divorce from the defendant; that when one year shall have expired, after the entry of this interlocutory judgment, a final decree shall be entered, granting a divorce herein, wherein and whereby the bonds of matrimony heretofore existing between said plaintiff and said defendant shall be dissolved;

“And it is further Ordered, Adjudged and Decreed that the said property settlement agreement be, and the same hereby is, ratified, ap-

proved and confirmed, and is hereby made a part of this decree by reference, and that the same shall be made a part of [63] and incorporated in the final decree in this matter.”

Final Judgment of Divorce, made and entered September 29, 1925:

After preliminary recitals as to interlocutory judgment entered September 26, 1924, and granting plaintiff a final judgment of divorce, the decree continues:

“It is further ordered, adjudged and decreed that that certain property settlement agreement, referred to in the interlocutory decree in this action and by reference made a part thereof, is hereby ratified, approved and confirmed, and the property of the parties hereto is hereby assigned in accordance with the terms of said agreement and the other rights and obligations of the parties hereto are assigned, determined and adjudged in accordance with the terms of said agreement, which agreement is hereby made a part of this judgment and is in words and figures as follows: to-wit:

[Here follows the April 1, 1924, agreement in full.]” [64]

## EXHIBIT H

Treasury Department, Washington

MT-ET-6305-6th California. Estate of Homer Laughlin. Date of death—December 27, 1932

Oct. 25, 1939

Beach D. Lyon, Administrator,  
R602—315 South Broadway,  
Los Angeles, California.

Sir:

Reference is made to your claim for refund of Federal estate tax in the amount of \$2,500.00, filed on behalf of the estate of Homer Laughlin, Jr., on October 22, 1938.

This claim is based upon the contention that the estate is entitled to additional deductions for attorney's fees, miscellaneous administration expenses and debts of decedent, as set forth in the statement attached to the claim for refund.

Consideration has been given to the claim and on the basis of the evidence now of record the following statement is submitted:

## DEDUCTIONS

	Returned	Determined	Adjusted
Attorney's fees .....	\$12,026.36	\$ 11,152.59	\$18,027.48
Miscellaneous adminis-			
tration expenses .....	23.55	790.55	1,065.66
Debts of decedent (in-			
come tax and inter-			
est, 1931 and 1932)	259,899.31	168,430.10	77,045.88

Attorney's fees are deducted in the amount which it appears has been paid and will be paid for services rendered in the administration of the estate.

Miscellaneous administration expenses are deducted in the amount which the evidence now of record indicates is a proper deduction under this heading.

Deduction is made for debts of decedent in the amount which [65] it appears was the personal obligation of the decedent on the date of his death, including \$1,659.47 for additional Federal income taxes for the years 1931 and 1932 and excluding \$101,259.35 representing decedent's liability in a separation agreement with his wife which was erroneously included as a deduction in the prior determination of the tax liability of the estate. This amount is not a proper deduction under section 812(b)(5) Internal Revenue Code. See also *Lewis v. Reynolds*, 51 Supreme Court 145; *Roby-Somers Coal Company v. Routzan*, 100 Fed. (2d) 228; *William T. Fitzpatrick estate*, 39 B.T.A. 162; *Eben Phillips estate*, 36 B.T.A. 752; *Empire Trust Company v. Commissioner*, 94 Fed. (2d) 307, affirming 35 B.T.A. 866.

The following summary is submitted:

Gross estate .....	\$1,011,440.81
Deductions, 1926 Act .....	851,306.71
<hr/>	
Net estate, 1926 Act .....	160,134.10
Net estate, 1932 Act .....	210,134.10
Gross tax, 1926 Act .....	\$ 3,304.02
Credit for estate or inheritance taxes .....	2,643.22
<hr/>	
Net tax, 1926 Act .....	660.80
Total gross taxes, 1926 and 1932 Acts .....	15,114.75
Gross tax, 1926 Act .....	3,304.02
<hr/>	
Additional tax .....	11,810.73
<hr/>	
Total net tax .....	12,471.53
Amount assessed pursuant to waiver.....	6,516.59
<hr/>	
Deficiency .....	\$ 5,954.94

You will observe that the audit review of the return results in a deficiency of \$5,954.94 instead of a refund of \$2,500.00, indicated in the claim.

In view of the foregoing, your claim for refund of Federal estate tax in the amount of \$2,500.00 is rejected in its entirety.

Respectfully,

GUY T. HELVERING,  
Commissioner.

By: /s/ D. S. BLISS,  
Deputy Commissioner. [66]



# EXHIBIT I

Form 1041  
Treasury Department  
Internal Revenue Service

UNITED STATES

Page 1  
1942

## FIDUCIARY INCOME TAX RETURN

(FOR ESTATES AND TRUSTS)

For Calendar Year 1942

or fiscal year beginning ....., 1942, and ending ....., 1943

File this return not later than the 15th day of the third month following the close of the taxable year.

(PRINT NAMES AND ADDRESS PLAINLY BELOW)

Name of Estate or Trust ESTATE OF HOMER LAUGHLIN, DECEASED

Name and Address of Fiduciary  
604 Homer Laughlin Building

Los Angeles California

(Do Not Use These Spaces)

File Code .....

Serial No. ....

District .....  
(Cashier's Stamp)

Cash Check M. O.  
FIRST PAYMENT

Item and Instruction No.

### INCOME

1. Dividends		\$	
2. Interest on bank deposits, notes, etc.			
3. Interest on corporation bonds, etc., (except interest to be reported in item 4)		\$	
4. Interest on tax-free covenant bonds upon which a Federal tax was paid at source		\$	
5. Interest on Government obligations, etc.:			
(a) From lines (c), (f), and (g), column 3 (a), Schedule B		\$	
(b) From line (h) Schedule B		\$	
(c) From line (i) Schedule B		\$	
6. Income (or loss) from partnerships, syndicates, pools, etc., and income from other fiduciaries (Name and address)			
7. Rents and royalties (from Schedule C)			64,996.01
8. (a) Net gain (or loss) from sale or exchange of capital assets (from Schedule E)			
(b) Net gain (or loss) from sale or exchange of property other than capital assets (from Schedule F)			
9. Net profit (or loss) from trade or business (attach statement)			
10. Other income (state nature of income) <u>Schedule attached</u>			54,661.05
11. Total income in items 1 to 10 (enter nontaxable income in Schedules B and F)			\$ 119,657.06

### DEDUCTIONS

12. Interest (explain in Schedule G)		\$ 27,603.12	
13. Taxes (explain in Schedule G)		26,405.43	
14. Other deductions authorized by law (explain in Schedule G)		10,177.00	
15. Total deductions in items 12 to 14			64,185.55
16. Balance (item 11 minus item 15)			\$ 55,471.51
17. Less amount distributable to beneficiaries (item 5 (a), above, plus total of column 2, Schedule A)			
18. Net income (taxable to fiduciary) (item 16 minus item 17)			\$ 55,471.51

### COMPUTATION OF TAX

19. Net income (item 18 above)	\$ 55,471.51	27. Total tax (item 26 or line 14, Schedule E)	\$ 29,819.49
20. Less: Personal exemption	500.00	28. Less: Fiduciary's share of income tax paid at source	\$
21. Balance (nontax net income)	\$ 54,971.51	29. Fiduciary's share of income tax paid to a foreign country or United States possession (Attach Form 1116)	
22. Less: Interest on Government obligations, etc. (item 5 (b), above)		30. Balance of tax (item 27 minus items 28 and 29)	\$ 29,819.49
23. Balance subject to normal tax	\$ 54,971.51		
24. Normal tax (6% of item 23)	\$ 3,298.29		
25. Surplus on item 21	26,521.20		
26. Total (item 24 plus item 25)	\$ 29,819.49		





1. Name and address of each beneficiary (Designate nonresident aliens)	2. Taxable income exclusive of interest on Government obligations subject to sur- tax only, and dividends to be reported in column 9	3. Federal income tax paid at source (2% of gross amount in item 4, page 1, minus item 28, page 1)	4. Income and profits taxes paid to a foreign country or United States possession
(a) .....	\$ .....	\$ .....	\$ .....
(b) .....	\$ .....	\$ .....	\$ .....
(c) .....	\$ .....	\$ .....	\$ .....
(d) .....	\$ .....	\$ .....	\$ .....
(e) .....	\$ .....	\$ .....	\$ .....
(f) .....	\$ .....	\$ .....	\$ .....
(g) .....	\$ .....	\$ .....	\$ .....
Total of beneficiaries' shares .....	\$ .....	\$ .....	\$ .....

[illegible]

1. Obligations or securities	2. Amount owned at end of year	3. Interest (and dividends subject to surtax only) received or accrued during the year	4. Fiduciary's share of interest exempt from taxation	5. Fiduciary's share of interest or amount in excess of exemption, and dividends subject to surtax only
		a. Beneficiaries' shares    b. Fiduciary's share		
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions	\$	\$	All	x x x x x x x x
(b) Obligations issued prior to March 1, 1941, under Federal Farm Loan Act, or under such Act as amended			All	x x x x x x x x
(c) Obligations of United States issued on or before September 1, 1917			All	x x x x x x x x
(d) Treasury Notes issued prior to December 1, 1940, Treasury Bills and Treasury Certificates of Indebtedness issued prior to March 1, 1941			All	x x x x x x x x
(e) United States Savings Bonds and Treasury Bonds issued prior to March 1, 1941			\$	\$
(f) Obligations of instrumentalities of the United States (other than obligations to be reported in (b) above) issued prior to March 1, 1941			None	
(g) Dividends on share accounts in Federal savings and loan associations in case of shares issued prior to March 28, 1942	x x x x x x x x		x x x x x x x x	
(h) Total (include in item 5 (b), page 1)				\$

(f) Treasury Notes issued on or after December 1, 1940, and obligations issued on or after March 1, 1941, by the United States or any agency or instrumentality thereof (enter amount of interest as item 5 (c), page 1)	Amount owned at end of year	Interest received or accrued during the year (subject to normal tax and surtax)
\$	\$	\$

1. Kind of property	2. Amount	3. Depreciation (explain in Schedule D)	4. Repairs (explain below)	5. Other expenses (itemize below)	6. Net profit (enter item 7, page 1)
Rentals from tenants of Homer Laughlin Building and Grand Central Public Market	217,218.28				
Less assignment of rent to Kila West	1,200.00				
	216,018.28	7,887.51	9,760.74	113,374.02	64,996.01

Explanation of deductions claimed in columns 4 and 5 Depreciation and other schedules attached.



## SCHEDULE C

## Item 4

## Repairs

Hardware, locks and glass .....	\$	41.27	
Carpenter—Woodwork .....		123.63	
Plaster .....		81.57	
Painting .....		806.83	
Plumbing .....		317.16	
Roof and Skylights .....		278.10	
Miscellaneous .....		99.76	\$ 1,748.32
<hr/>			
Grand Central Public Market—Repairs.....			8,012.42
<hr/>			
			\$ 9,760.74
			<hr/>

## Item 10

## Other Income

Service and Miscellaneous revenues building.....	\$	82.00	
Grand Central Public Market			
Light and Power revenue.....	\$22,390.14		
Information Department Income.....	7,765.77		
Advertising .....	1,749.34		
Miscellaneous .....	1,693.71		
Water .....	3,380.02		
Garbage and Rubbish .....	5,364.82		
Storage Revenue .....	8,599.15		
Janitor Service revenue .....	3,636.10	54,579.05	
<hr/>			
			\$ 54,661.05
			<hr/>

## Item 13

## Taxes Paid

Federal excise taxes .....	\$	18.32
Los Angeles City and County—real estate and personal property .....		20,695.17
Los Angeles City and County—solvent credits.....		21.47
Riverside County—real estate.....		2.53
San Bernardino County—real estate .....		3.20
Federal unemployment taxes .....		178.86
California State Unemployment taxes .....		603.90
Federal Old Age benefit taxes .....		596.26
		<hr/>
		22,119.71
California State income tax 1942.....		4,285.72
		<hr/>
	\$	26,405.43
		<hr/> <hr/>

## SCHEDULE G

## Item 14

## Other Deductions

## Contributions

Little Sisters of the Poor.....	\$	15.00
Y.M.C.A. ....		50.00
Los Angeles Community Chest.....		425.00
7th Day Adventist Church.....		20.00
Tuberculoses Assn. ....		2.00
L. A. Visiting Nurses Ass'n. ....		10.00
United China Relief .....		10.00
United Service Organizations .....		25.00
Women's Ambulance Defense Corp. ....	20.00	\$ 577.00

Ada Edwards Laughlin—Property settlement agreement with Homer Laughlin—\$800.00 per month for life .....	9,600.00
	<hr/>
	\$ 10,177.00
	<hr/> <hr/>

## SCHEDULE C

## Item 5

## Other Expenses

## Management Expenses:

Salaries—Office and Management....	\$25,657.52	
Office stationery, supplies and expenses .....	393.65	\$ 26,051.17

## Homer Laughlin Building Expense:

Leasing expense .....	\$	5.00
-----------------------	----	------

## Janitor Service

Salaries .....	\$8,854.10	
Supplies .....	369.91	
Window cleaning .....	500.00	
Toilet supplies .....	319.90	10,043.91

## Electric Lighting

Current .....	342.50	
Lamps .....	46.66	
Miscellaneous .....	11.69	400.85

## Heat and Ventilating

Heat .....	1,512.00	
Gas .....	9.66	1,521.66

## Plumbing

Water .....	299.20	
Hot Water .....	300.00	599.20

## Elevator Service

Salaries .....	3,481.63	
Power .....	1,353.96	
Liability Insurance .....	129.96	
Inspection, repairs & Misc. ....	513.81	5,479.36

## General Operating Expenses:

Salaries—Watchmen ..	301.94	
Rubbish removal .....	96.00	
Directory board .....	28.22	
Compensation Insurance .....	168.96	

## SCHEDULE C (Continued)

## Item 5—General Operating Expenses—(Continued)

Water for Fire Hose	\$ 50.96	
Air Raid Protection...	178.51	
Miscellaneous .....	4.00	\$ 828.59
<hr/>		
Alterations for tenants .....	67.07	
Miscellaneous service costs .....	1.86	
Street Lighting assessment .....	103.18	
Insurance .....	633.88	
Legal and Auditing .....	5,286.84	
Dues and Subscriptions, etc.....	1,048.96	
Loss on bad accounts—tenants.....	360.00	26,380.36
<hr/>		
Grand Central Public Market Expense		
Office Salaries .....	\$ 4,144.89	
Office Supplies and expense.....	1,211.70	
Miscellaneous Administrative ex- pense .....	652.28	
Salaries and Wages .....	30,763.68	
Insurance .....	2,718.68	
Market Expenses, etc. ....	4,507.87	
Janitor Service .....	2,995.01	
Water .....	3,743.88	
Garbage and Rubbish disposal.....	11,069.80	
Light and Power .....	12,559.39	
Bags and Information expense.....	5,287.81	
Advertising .....	1,287.50	80,942.49
<hr/>		
		<u>\$133,374.02</u>

**SCHEDULE D**  
**Grand Central Public Market**  
**Furniture, Fixtures, Equipment and Related Reserves**  
**Year Ended December 31, 1942**

Description	Date Acquired	Depreciation Rate	Balance 12-31-41	1942 Additions	Balance 12-31-42	Reserve Balance 12-31-41	1942 Depreciation	Reserve Balance 12-31-42
<b>Market Fixtures and Equipment—Old</b>								
22 Ceiling Fans—2nd hand	1/ 1/40	20%	\$ 330.00		\$ 330.00	\$ 132.00	\$ 66.00	\$ 198.00
3 Exhaust Fans—2nd hand	do	20	300.00		300.00	120.00	60.00	180.00
2 Neon Street signs—2nd hand	do	20	175.00		175.00	70.00	35.00	105.00
3 Electric Clocks—2nd hand	do	20	25.00		25.00	10.00	5.00	15.00
3 Electric panel switch-boards	do	10	3,932.00		3,932.00	786.40	393.20	1,179.60
<b>Total—Old</b>			<b>4,762.00</b>		<b>4,762.00</b>	<b>1,118.40</b>	<b>559.20</b>	<b>1,677.60</b>
<b>Market Fixtures and Equipment—New</b>								
2 Ladders	1 22/40	20%	16.56		16.56	6.17	3.31	9.48
1 Wheel Barrow	5/27/40	"	18.69		18.69	6.16	3.74	9.90
1 Eureka Vacuum Cleaner	10/16/40	"	41.53		41.53	9.69	8.31	18.00
1 Used Simplex Time Recorder	10/24/40	"	93.54		93.54	21.82	18.71	40.53
1 Platform Truck—SPT 18283	4 11/40	"	56.91		56.91	18.98	11.38	30.36
12 Gar Bro Warehouse Trucks	5/27/40	"	702.96		702.96	222.59	140.69	363.18
12 Gar Bro Warehouse Trucks	7/27/40	"	702.54		702.54	199.06	140.51	339.57
New Elevator Gates installed	2/28/40	10	350.00		350.00	64.20	35.00	99.20
New Elevator Enclosure	2 17/40	"	158.38		158.38	29.04	15.84	44.88
do Rear Enclosure	3/ 3/40	"	12.04		12.04	2.20	1.20	3.40
Elevator Fire door and safety gates	1 8/40	"	528.00		528.00	105.60	52.80	158.40
do Special folding gate	2 8/40	"	71.50		71.50	13.75	7.15	20.90
do Automatic gates and fire doors	12 5/40	"	536.00		536.00	58.07	53.60	111.67
do Enclosure	11 9/40	"	92.60		92.60	10.03	9.26	19.29
1 New Toledo scale	12/31/40	"	206.50		206.50	20.65	20.65	41.30
1 Beam for elevator shaft	1 31/41	"	24.51		24.51	2.45	2.45	4.90
Enclosure constructed	1 31/41	"	251.85		251.85	25.18	25.19	50.37
Bell system on elevator	1 31/41	"	10.02		10.02	1.00	1.00	2.00
Electric installation for light & bell system—elev.	1 31/41	"	78.34		78.34	7.15	7.83	14.98
Push button system—Info. Desk	1 31/41	"	42.94		42.94	3.57	4.29	7.86
Information booth	1 31/41	"	974.57		974.57	88.54	97.46	186.00
New elevator and 3 fire doors	2 28/41	"	1,236.60		1,236.60	113.30	123.60	236.90
4 52" Fans and 1 18" Fan	5 31/41	"	192.56		192.56	10.86	19.26	30.12
1 Brown Thermador heater—Fan type	10/41/41	"	9.43		9.43	—	.94	.94
2 Water Meters	10/31/41	"	20.00		20.00	.33	2.00	2.33
2 Step Ladders	12/31/41	"	10.20		10.20	—	1.02	1.02
Neon Sign (Info Desk)	6/30/42	"		\$ 65.00	65.20	—	3.24	3.24
Locker Cabinet	3 1/42	"		35.46	35.46	—	3.00	3.00
do	6 1/42	"		21.10	21.10	—	1.26	1.26
Second Hand fixtures	6/30/42	"		927.00	927.00	—	46.38	46.38
Doughnut Machine	4 1/42	20		382.00	382.00	—	57.33	57.33
Strutler and blankets	3 1/42	"		14.13	14.13	—	2.40	2.40
Scrubbing machine & vacuum cleaner	3 1/42	"		897.80	897.80	—	149.60	149.60
Attachment for scrubbing machine	6 1/42	"		8.75	8.75	—	1.05	1.05
Tables, Chairs and Seftres	5/31/42	10		70.20	70.20	—	4.20	4.20
do	6/30/42	"		9.70	9.70	—	.48	.48
3 Chairs	8/31/42	"		28.88	28.88	—	1.00	1.00
<b>Total Old</b>			<b>6,438.17</b>	<b>2,460.02</b>	<b>8,898.19</b>	<b>1,040.39</b>	<b>1,077.03</b>	<b>2,117.42</b>
<b>Total Market fixtures and equipment</b>			<b>11,200.17</b>	<b>2,460.02</b>	<b>13,660.19</b>	<b>2,158.79</b>	<b>1,636.23</b>	<b>3,755.02</b>
<b>Market Furniture and Equipment—Office—Old</b>								
1 Steel safe—2nd hand	1 1/40	20	100.00		100.00	40.00	20.00	60.00
1 Steel filing cabinet—2nd hand	do	20	35.00		35.00	14.00	7.00	21.00
4 Desks	do	20	115.00		115.00	46.00	23.00	69.00
1 Typewriter Desk	do	20	10.00		10.00	4.00	2.00	6.00
10 Chairs	do	20	47.00		47.00	18.80	9.40	28.20
1 Victor Add. Machine—2nd hand	do	20	75.00		75.00	30.00	15.00	45.00
1 Electric Wagner Fan	do	20	15.00		15.00	6.00	3.00	9.00
1 Electric Wall Clock—2nd hand	do	20	5.00		5.00	2.00	1.00	3.00
1 w/wash baskets etc—2nd hand	do	20	13.00		13.00	5.20	2.60	7.80
<b>Total Old</b>			<b>415.00</b>		<b>415.00</b>	<b>166.00</b>	<b>83.00</b>	<b>249.00</b>
<b>Market Furniture and Equipment—Office—New</b>								
New Remington Band	3 19/40	20%	115.34		115.34	47.37	23.67	74.44
Wagner Co. Electric Fan	5 18/40		26.50		26.50	7.50	5.90	12.80
<b>Total New</b>			<b>161.84</b>		<b>161.84</b>	<b>54.87</b>	<b>29.57</b>	<b>87.24</b>
<b>Total Furniture and Equipment—Office</b>			<b>576.84</b>		<b>576.84</b>	<b>220.87</b>	<b>112.57</b>	<b>336.24</b>
<b>Total</b>			<b>\$11,777.01</b>	<b>\$2,460.02</b>	<b>\$14,237.03</b>	<b>\$2,379.66</b>	<b>\$1,751.60</b>	<b>\$4,131.26</b>





## SCHEDULE J

## Depreciation

## Homer Laughlin Building:

Treasury Department in Washington fixed the value of the Homer Laughlin Building property at \$900,000.00 for estate tax purposes. As a separate value the land and building was not shown, the value of the building has been determined by using the percentages of the assessed valuation of the building to the total assessed valuation as shown on the 1932-33 tax bill. These values were as follows:

Land .....	\$404,650.00	81%
Building .....	95,240.00	19%
	<hr/>	<hr/>
	\$499,890.00	100%
	<hr/>	<hr/>
Building (19% of \$900,000.00).....	\$171,000.00	
Additions to December 31, 1940.....	11,826.60	
	<hr/>	
	\$182,826.60	
	<hr/>	
Depreciation—31⅓% of \$182,826.60 .....		\$6,093.61
Equipment per Federal Estate Tax return .....	300.00	
Additions to 12/31/42 .....	1,819.10	
	<hr/>	
	\$ 2,119.10	
	<hr/>	
Depreciation as 12/31/41 balance— (15% of \$1,494.08) .....	224.11	
Less: Depreciation fully depreciated assets .....	197.44	
	<hr/>	
	26.67	
Add: Depreciation on 1942 additions	15.63	42.30
	<hr/>	<hr/>
		\$6,135.91

SCHEDULE J (Continued)

Grand Central Public Market Depreciation (Schedule attached) .....	1,751.60
Total 1942 Depreciation .....	<u>\$7,887.51</u>

Analysis of Reserve for Depreciation

	Building	Equipment	Total
1932 and 1933.....	\$ 5,847.00	\$ 79.42	\$ 5,926.42
1934.....	5,982.00	153.74	6,135.74
1935.....	6,093.60	166.05	6,259.65
1936.....	6,093.60	173.41	6,267.01
1937.....	6,093.60	196.28	6,289.88
1938.....	6,093.60	214.80	6,308.40
1939.....	6,093.60	177.65	6,271.25
1940.....	6,093.61	56.94	6,150.55
1941.....	6,093.61	21.77	6,115.38
1942.....	6,093.61	42.30	6,135.91
	<u>\$60,577.83</u>	<u>\$1,282.36</u>	<u>\$61,860.19</u>

1943. Filed September 10, 1943

[Title of Tax Court and Cause.]

SUPPLEMENTAL STIPULATION OF FACTS

It is hereby stipulated between the parties hereto, by their respective counsel, that certain proceedings have been had in the matter of the Estate of Homer Laughlin, deceased, Superior Court, Los Angeles County, California, as shown by the attached excerpts from the Fifth Account Current of the Administrator with the Will Annexed and the Order of the Superior Court thereon.

Dated: June 5, 1946.

/s/ W. L. NOSSAMAN,  
Counsel for Petitioner.

/s/ J. P. WENCHEL, ECC  
Chief Counsel, Bureau of  
Internal Revenue, Counsel  
for Respondent. [76]

Excepts from Fifth Account Current and Report of Administrator with the Will Annexed Covering the Period September 1, 1941, to June 30, 1943. Filed September 10, 1943.

In the Superior Court of the State of California

In and for the County of Los Angeles

No. 132875

In the Matter of the Estate of

HOMER LAUGHLIN,

Deceased.

FIFTH ACCOUNT CURRENT AND REPORT  
OF ADMINISTRATOR WITH THE WILL  
ANNEXED

Beach D. Lyon, as Administrator With the Will

Annexed of the Estate of Homer Laughlin, deceased, renders to the Court his Fifth Account Current and Report of his administration of said estate up to and including the 30th day of June, 1943, as follows, to wit:

Said Administrator With the Will Annexed is charged as follows:

Balance at date of Fourth Account Current.....	\$1,031,472.36
Received as rents, etc., from operation of Homer Laughlin Building, September 1, 1941, to June 30, 1943 .....	559,492.15
Received from Department of Water and Power account alterations to office portion of Homer Laughlin Building .....	1,673.28
Received from Clark Rynders balance on loans of July 28, 1941, and April 1, 1942.....	325.00
	<hr/>
Total Charges .....	\$1,592,962.79

And he is entitled to credits as follows:

1942		
Jan.	2—Ella West Buell, Annuity.....	\$100.00
Feb.	5—Ella West Buell, Annuity.....	100.00
March	2—Ella West Buell, Annuity.....	100.00
April	1—Ella West Buell, Annuity.....	100.00
May	1—Ella West Buell, Annuity.....	100.00
June	1—Ella West Buell, Annuity.....	100.00
July	1—Ella West Buell, Annuity.....	100.00
Aug.	1—Ella West Buell, Annuity.....	100.00
Sept.	1—Ella West Buell, Annuity.....	100.00
Oct.	1—Ella West Buell, Annuity.....	100.00
Nov.	3—Ella West Buell, Annuity.....	100.00
Dec.	2—Ella West Buell, Annuity.....	100.00
	Total Credits .....	\$524,087.43
	Total Charges .....	\$1,592,962.79
	Total Credits .....	524,087.43
		<hr/>
	Chargeable to Next Account.....	\$1,068,875.36

[Verified by Beach D. Lyon, Administrator With  
the Will Annexed, August 23, 1943.] [78]

C-TS:PD

LA:DLR

On October 1, 1943, the Court made the following  
order (certified copy hereto attached as Exhibit J):

“The report and fifth account current herein  
of Beach D. Lyon, as administrator with-will-  
annexed of the estate of said deceased, by Russ  
Avery, his attorney, coming on this 1st day of  
October, 1943, for hearing and settlement by the  
Court, all notices of said hearing having been  
given as required by law, showing, after de-  
ducting the credits to which said administrator  
with-will-annexed is entitled, a balance of  
\$1,068,875.36, of which \$47,586.86 is in cash,  
belonging to said estate, and the evidence hav-  
ing been heard,

“It Is Ordered, Adjudged and Decreed by  
the Court that said account and report is  
hereby allowed, settled and approved.” [79]

## EXHIBIT J

On Oct. 1, 1943, in Department 25 of the Superior Court of the State of California in and for the County of Los Angeles, Hon. William R. McKay, judge, presiding, the following proceedings were had, to wit:

Order Settling Fifth Account Current And Report  
Of Administrator With Will-Annexed  
631/288

No. 132875

In the Matter of the Estate of

HOMER LAUGHLIN,

Deceased.

The report and fifth account current herein of Beach D. Lyon, as administrator with-will-annexed of the estate of said deceased, by Russ Avery, his attorney, coming on this 1st day of October, 1943, for hearing and settlement by the Court, all notices of said hearing having been given as required by law, showing, after deducting the credits to which said administrator with-will-annexed is entitled, a balance of \$1,068,875.36, of which \$47,586.86 is in cash, belonging to said estate, and the evidence having been heard,

It Is Ordered, Adjudged and Decreed by the Court that said account and report is hereby allowed, settled and approved.

The foregoing instrument is a correct copy of the original as the same appears of record.

Attest June 5, 1946.

J. F. MORONEY,

County Clerk and Clerk of the Superior Court of  
the State of California in and for the County  
of Los Angeles.

By /s/ Y. NISHIHAWA,

Deputy.

[Endorsed]: Filed June 10, 1946. [80]

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[Title of Tax Court and Cause.]

1. Decedent entered into an agreement with a beneficiary of a life annuity under his father's will whereby the beneficiary released her interest in that estate so the estate could be distributed to the residuary legatees of which the decedent was one upon the assignment to her of \$100 per month for life of the rentals from a building owned by decedent. Held, that petitioner was not the owner of this \$100 per month paid out of such rentals to the annuitant and it should not be included in petitioner's gross income. *Blair v. Commissioner*, 300 U. S. 5.

2. Several years prior to his death decedent entered into an agreement with his wife wherein he agreed to make certain monthly payments for life for her support and maintenance which was incorporated in a divorce decree. Held, the payments

were not deductible from gross income of decedent's estate. [81]

## OPINION

Black, Judge:

This proceeding involves a deficiency in income tax for the calendar year 1942 in the amount of \$8,647.89. The deficiency is due to several adjustments to the net income of the estate of Homer Laughlin as disclosed by its return for the year 1942. Petitioner, by appropriate assignments of error, contests two of these adjustments in the respective amounts of \$1,200 and \$9,600. These adjustments were explained by the respondent in a statement attached to the deficiency notice as follows:

(a) There is restored to gross income, or disallowed as a deduction therefrom, under the applicable provisions of the Internal Revenue Code, the exclusion or deduction of \$1,200.00 shown in Schedule C of your return as "Less assignment of rent to Ella West."

(d) The deduction of \$9,600.00 claimed for payment to Ada Edwards Laughlin on account of "property settlement agreement with Homer Laughlin—\$800.00 per month for life" is not allowable under the Internal Revenue Code.

There are, therefore, two issues in this proceeding, namely, (1) whether the amount of \$1,200 paid to Ella West under the facts hereinafter set forth is excludible or deductible from the gross income



of decedent's estate for the calendar year 1942; and (2) whether the amount of \$9,600 provided for in an agreement entered into between decedent and his wife, Ada Edwards Laughlin, and incorporated in a decree of divorce, is deductible from the gross income of decedent's estate for the calendar year 1942. [82]

All the facts are stipulated. The stipulation is incorporated herein by reference and adopted as our findings of fact. Such facts as are deemed necessary to an understanding of the issues decided are summarized below:

Issue 1. Petitioner is the administrator with the will annexed of the estate of Homer Laughlin who died on December 27, 1932, a resident of Los Angeles, California. The estate is still in the process of administration. The income tax return of the estate for the taxable period involved was filed with the collector for the sixth district of California on or before March 15, 1943. Homer Laughlin, Sr., father of Homer Laughlin, died on or about January 10, 1913, leaving a last will and testament dated August 30, 1909, duly admitted to probate on January 29, 1913, in the Superior Court of the State of California in and for the County of Los Angeles, which will contained, among other provisions, the following:

Second: I give, devise and bequeath unto my nieces, Ella West and Nancy McIntosh, each the sum of One Hundred dollars (\$100) per month, payable quarterly to each of them during their natural life.

After certain other legacies, bequests, and devises, the will gave the residue of the estate equally to decedent's son and daughter, Homer Laughlin and Guendolyn (or Guendolen) Virginia Laughlin. On August 1, 1921, Homer Laughlin and Ella West entered into a written agreement providing in part as follows:

I, Ella West, in consideration of Five Hundred Dollars (\$500.00) in hand paid to me, and in further consideration of an assignment of One Hundred Dollars (\$100.00) per month of the rent to be paid by the lessee of the ground floor of the Laughlin Building, and in further consideration of the assumption of Homer Laughlin, Jr. to pay me the said sum of One Hundred Dollars (\$100.00) per month during the remainder of my natural life, do hereby release the said Homer Laughlin, Jr., as Trustee, Guendolen V. Laughlin, and all of the property [83] comprising the estate of Homer Laughlin, deceased, late of Los Angeles, California, from the payment of the annuity provided for in the will and decree of distribution in the estate of said Homer Laughlin, hereby releasing absolutely any claim of every character either against said persons or the property of said estate, the said lessee having recognized the said assignment and having agreed to pay to me the said sum monthly of the rent due and payable to the said Laughlin for the said ground floor of said building.

The purpose of this agreement was to obtain her consent to the distribution of the estate which was made thereafter in due course, pursuant to the court decree.

The above-mentioned Laughlin Building is located at No. 315 South Broadway, Los Angeles, California. From about August 1, 1921, it was the property of Homer Laughlin. He acquired a one-half interest in the building as a devisee under his father's will and purchased the other half from his sister, Guendolyn, the funds for such purpose being obtained by the mortgage on such building to the Metropolitan Life Insurance Company. The Laughlin Building is a part of Homer Laughlin's estate which has been in process of administration in the Superior Court of the State of California in and for the County of Los Angeles since about February 4, 1933, on which date the will was duly admitted to probate. In May, 1933, a dispute having arisen between Ella West and the estate of Homer Laughlin as to her rights under the agreement of August 1, 1921, a suit for declaratory relief was brought in the Superior Court of the State of California in and for the County of Los Angeles. On June 28, 1933, the court rendered its judgment against Beach D. Lyon and Beach D. Lyon, as Administrator with the will annexed of the estate of Homer Laughlin, deceased, which judgment provided in part as follows: [84]

\* \* \* on the 1st day of August, 1921, Homer Laughlin assigned to the plaintiff Ella West

One Hundred (\$100) Dollars of the monthly rental due or to become due from the lessee of the ground floor of the Laughlin Building, which sum was to be paid to the plaintiff Ella West each month during the remainder of her natural life; that from and after said 1st day of August, 1921, Homer Laughlin had no right, title, or interest in and to said sum of One Hundred (\$100) Dollars so assigned to this plaintiff; that the defendants Beach D. Lyon, and Beach D. Lyon as Administrator with the Will annexed of the estate of Homer Laughlin, have no right, title, or interest in and to the said sum of One Hundred (\$100) Dollars of the monthly rental due or to become due from the lessee of the ground floor of the Laughlin Building, \* \* \*.

On July 7, 1933, the court made a further judgment in this suit determining the issues between plaintiff and the remaining defendants and reciting in part as follows:

It Is Ordered, Adjudged and Decreed that on the 1st day of August, 1921, Homer Laughlin for valuable consideration assigned to the plaintiff herein, Ella West, for the remainder of her natural life, the sum of \$100.00 per month, said sum to be paid from the rent due from the tenant in possession of the ground floor of the Laughlin Building;

And It Is Further Ordered, Adjudged and Decreed that defendant Grand Central Public

Market, Inc., be and it is hereby ordered and authorized to pay to this plaintiff the sum of \$100.00 per month during the natural life of said plaintiff so long as said Grand Central Public Market, Inc., remains in possession of the ground floor of the Laughlin Building, or so long as it is obligated on any lease of the ground floor of the Laughlin Building.

And It is Further Ordered, Adjudged and Decreed that the defendant Citizens National Trust and Savings Bank of Los Angeles, a national banking association, as Trustee, and the defendant Grand Central Public Market, Inc., a corporation, have no right, title or interest in or to said sum of \$100.00 per month so assigned by Homer Laughlin to Ella West.

The lessee of the ground floor of the Laughlin Building was the Grand Central Public Market, Inc. which terminated on October 31, 1939, and petitioner leased the ground floor of the building to other tenants, negotiating and executing these leases. Ella West was not consulted nor did she in any manner participate therein. [85]

During the taxable year 1942 petitioner paid to Ella West the sum of \$1,200 pursuant to the agreement of August 1, 1921, between Homer Laughlin and Ella West and the Superior Court judgment of June 28, 1933. This sum was paid out of rentals received by petitioner from the ground floor of the Laughlin Building during that year. The gross and net rentals received by petitioner from that source

for and during the taxable year 1942 were greatly in excess of the sum of \$1,200.

In the federal estate tax return filed by the estate of Homer Laughlin there was claimed under schedule entitled "Debts of Decedent" the following item: "Ella West (\$100 per mo. Expectancy 11 years. \$16,610.00." In the final determination of decedent's estate tax liability the Ella West claim was allowed as a deduction in the total amount of \$9,194.05, such amount being the present value at the date of decedent's death of an annuity of \$100 per month payable during the expected life of Ella West, who was then 66 years of age.

The first issue we have to decide is whether the \$1,200 paid to Ella West during the year 1942 is either excludible or deductible from the gross income of the decedent's estate. Petitioner contends that the sums paid to Ella West were paid pursuant to an assignment or transfer of a corresponding interest by the decedent, Homer Laughlin, in the real property designated as the ground floor of the Laughlin Building; that to the extent mentioned Ella West had an interest in that property, and that as to the sums received and paid over to her the estate acted as a mere conduit; that for these reasons the \$1,200 paid to Ella West is excludible from the gross income of the estate for 1942. In the alternative petitioner claims that the payments in question were required to be made and were made out of the income of the estate; that the \$1,200 represented income which was distributable [86] and was actually distributed during the taxable year

to Ella West as a legatee, heir, or beneficiary and is deductible under the provisions of section 162(b) of the Internal Revenue Code.

Respondent contends that the sum of \$1,200 paid by petitioner to Ella West during the year 1942 was for the satisfaction of a debt of Homer Laughlin, incurred during his lifetime in a capital transaction, and is not a distribution of income within the meaning of section 162(b). He further argues that in the federal estate tax return filed by the estate of Homer Laughlin, there was claimed as debts of the decedent the following item: "Ella West (\$100 per mo. Expectancy 11 years. \$16,610.00"; that in the final determination of decedent's estate tax liability the Ella West claim was allowed as a deduction in the amount of \$9,194.05, such amount being the present value at the date of the decedent's death of an annuity of \$100 per month payable during the expected life of Ella West who was then 66 years of age. He maintains that decedent's estate having had the benefit of a deduction of \$9,194.05 as above set out, there has been a recognition that the sum represented a debt of the decedent, and it is, therefore, not deductible from the gross income of the estate.

In deciding the issue which we have here to decide, it is not necessary for us to say whether the respondent acted properly in allowing to the estate of decedent for estate tax purposes a deduction of the commuted value of the annuity payments due to Ella West, based on her life expectancy at the time of decedent's death. We do not have the estate

tax case before us and therefore have nothing to decide with respect to it. [87]

What we have to decide is the legal effect of the agreement which Homer Laughlin made with Ella West on August 1, 1921. It is necessary to examine that document and the circumstances attending its execution to determine its force and effect. In the last will and testament of the father of Homer Laughlin, he bequeathed to Ella West an annuity of \$100 a month for life. This annuity was payable in all events, whether the estate had income or not. It required no citation of authorities to support the proposition that it was a charge against all the property in Homer Laughlin, Sr.'s residuary estate. Homer Laughlin, Jr., and his sister were the equal beneficiaries of this residuary estate. One of the valuable assets of the residuary estate was the Laughlin Building situated in Los Angeles. Homer purchased his sister's one-half interest in this building and in order to secure the release of Ella West from her claim against the estate of Homer Laughlin, Sr., for the payment of a life annuity of \$100 a month, Homer Jr. assigned to her irrevocably \$100 a month for life out of the rents from the ground floor of the Laughlin Building. This, it seems to us, was more than a mere assignment of future income as that term is commonly understood, but was an assignment of a property interest to Ella West in the rentals from the ground floor of the Laughlin Building. This is the effect of the judgment of the Superior Court of California in and for the County of Los Angeles in Cause No.



356,776 in which Ella West was plaintiff and Beach D. Lyon, individually and Beach D. Lyon, as administrator were defendants. The judgement in that cause has been set out above. It seems to us there can be no question but that the Superior Court has correctly interpreted the terms of the agreement between Ella and Homer. We shall so regard it in deciding issue 1. [88]

Petitioner relies chiefly on *Blair v. Commissioner*, 300 U. S. 5. In that case the life beneficiary of a testamentary trust assigned to his children "an interest amounting to \$6,000 for the remainder of that calendar year, and to \$9,000 in each calendar year thereafter, in the net income which the petitioner was then or might thereafter be entitled to receive during his life." The Court held that where the life beneficiary of a trust assigned a share of the income to another for life without retaining any form of control over the interest assigned, the assignment was a transfer in praesenti to the donee of a life interest in the corpus of the trust property and the income paid to the donee was taxable to him and not the donor. We think the *Blair* case is applicable and controlling here. In the *Blair* case, the Court in speaking of the nature and effect of the irrevocable assignment which had been made said:

\* \* \* The assignment of the beneficial interest is not the assignment of a chose in action but of the "right, title, and estate in and to property." [Citing authorities.]

We conclude that the assignments were valid, that the assignees thereby became the owners of the specified beneficial interests in the income, and that as to these interests they and not the petitioner were taxable for the tax years in question. \* \* \*

In the instant case Homer Laughlin was not only the beneficial owner of the Laughlin Building, he was the actual owner in fee simple of the building and unquestionably had the right to convey the interest which he did convey to Ella West. Therefore, in view of what the Supreme Court said in the Blair case, we hold that the \$1,200 in question should be excluded from the income of petitioner. It did not belong to him—it was the property of Ella West. See Herbert R. Graf, 45 B.T.A. 386, which we also think is an applicable authority which supports our decision here. [89]

Having held that such amount is to be excluded from petitioner's income, it becomes unnecessary to pass upon petitioner's alternative contention that if the estate is not entitled to have such amount excluded from gross income, it is entitled to have such payment allowed as a deduction in computing net income.

We think the facts of the instant case distinguish it from such cases as Corbett Investment Co. v. Helvering, 75 Fed. (2d) 525, 15 AFTR 234, affirming Memorandum Opinion of the Board. The Corbett case was a case where a decedent bequeathed to his widow an annual sum payable monthly from

income of realty devised to grandsons, and the widow released the realty from this obligation and accepted the personal undertaking of the grandsons to continue the payment of the annuity and subsequently the grandsons conveyed the realty to a corporation which assumed liability for the monthly payments. On these facts the court held that the transactions between the widow and grandsons and between the grandsons and the corporation were in the nature of a purchase and that the annual payments made to the widow were capital expenditures and not deductible by the corporation even though the payments were taxable to the widow. In thus holding the court said:

\* \* \* In this case, from the time of the transfer of the real estate to petitioner from the grandsons, petitioner received all the rents in its own right and so far as we are told by anything in the record, it had the right and the power to use them without accountability to the widow or any one else, and the widow's only right was to demand and receive from petitioner a thousand dollars monthly, regardless of the source from which it came. The payments to her, therefore, were clearly taxable to petitioner, even though they were also taxable to her. \* \* \* [Underscoring supplied.] [90]

As we have already pointed out in the agreement of August 1, 1921, between Homer and Ella, Homer definitely assigned to her \$100 of the rent from the Laughlin Building for the remainder of her natural life. It was under these facts that the Superior

Court of Los Angeles held that Ella was the owner of this income right to receive \$100 a month from the Laughlin Building and that:

\* \* \* Homer Laughlin had no right, title, or interest in and to said sum of One Hundred (\$100) Dollars so assigned to this plaintiff; that the defendants Beach D. Lyon, and Beach D. Lyon as Administrator with the Will annexed of the estate of Homer Laughlin, have no right, title or interest in and to the said sum of One Hundred (\$100) Dollars of the monthly rental due or to become due from the lessee of the ground floor of the Laughlin Building, \* \* \*.

It is because of the foregoing facts that we think the instant case is distinguishable from Corbett Investment Co. v. Helvering, *supra*, and other cases of that kind which have followed it.

Issue 2. On or about April 1, 1924, Homer Laughlin and his then wife, Ada Edwards Laughlin, entered into a property and support and maintenance settlement agreement which was approved and affirmed in an interlocutory decree of divorce dated September 24, 1924, in the Superior Court of the State of California in and for the County of Los Angeles and in a final decree dated September 29, 1925, pursuant thereto. The agreement provided that Homer Laughlin pay his wife a life income of \$800 per month provided, however, that if the parties should be divorced and his wife should remarry then these payments should be reduced to

\$300 monthly. It also provided that, in order to secure the faithful performance of the terms and conditions of this agreement, it was agreed that the Homer Laughlin Building should be hypothecated as security for the faithful performance of the terms and conditions of the agreement. The agreement provided in part as follows:

9. In order to secure the faithful performance of the terms and conditions of this agreement, the party of the first part covenants and agrees that that certain real estate, together with the improvements thereon, known as the "Homer Laughlin Building," located between Third and Fourth Streets, on the west side of Broadway, in the city of Los Angeles, state of California, shall be and is hereby hypothecated as security for the faithful performance of all of the terms and conditions of this agreement, and especially for the payment of the said monthly installments of \$800 each, \* \* \*

It was also agreed that if the Homer Laughlin Building should be sold, Homer Laughlin should deposit with a trust company the sum of \$150,000, which trust fund should stand as security for the faithful performance of all the terms and conditions of this agreement in lieu of the Homer Laughlin Building. It was further agreed that if Homer Laughlin should at any time create a trust fund of \$150,000 or shall furnish the wife an insurance policy guaranteeing the performance of the terms of this agreement by Homer Laughlin,

the wife agreed to release the Homer Laughlin Building from the lien or obligation of the contract. It was provided that these payments shall survive the death of Homer Laughlin and shall be binding upon his estate.

The final judgment of divorce made and entered September 29, 1925, decreed in part that: [92]

\* \* \* the property settlement agreement, referred to in the interlocutory decree in this action and by reference made a part thereof, is hereby ratified, approved and confirmed, and the property of the parties hereto is hereby assigned in accordance with the terms of said agreement and the other rights and obligations of the parties hereto are assigned, determined and adjudged in accordance with the terms of said agreement, which agreement is hereby made a part of this judgment and is in words and figures as follows, to wit: \* \* \*.

During his lifetime Homer Laughlin paid to Ada Edwards Laughlin \$800 per month as provided in the settlement agreement. Ada Edwards Laughlin is living at the date hereof and has never remarried. The Homer Laughlin Building was not sold by Homer Laughlin nor by his estate. The trust fund above referred to has never been established nor has the insurance policy been furnished guaranteeing Homer Laughlin's performance of the terms of the settlement agreement.

During the taxable year 1942, petitioner paid to Ada Edwards Laughlin the sum of \$9,600 pursuant

to the April 1, 1924 agreement and the court decrees in the divorce action.

In Schedule 1 "Debts of Decedent" of the federal estate tax return of the estate of Homer Laughlin, the following item was claimed as a deduction:

Indebtedness in favor of Ada Edwards Laughlin, in pursuance of Property Settlement Agreement, dated April 1, 1924, approved by Decree of Superior Court of the State of California, in and for the County of Los Angeles, and secured as a lien on the building, subject to Trust Deed in favor of Metropolitan Life Insurance Co. (To return \$9600.00) Expectancy 16 years .....\$152,480.00.

In the first audit of the return this item was reduced by the Commissioner to \$101,259.35 but was later eliminated by the Commissioner in the manner hereinafter set forth. On October 22, 1938 petitioner filed a claim for refund in the amount of \$2,500 on account of certain omitted expense items such as attorneys fees and miscellaneous administrative expenses. These expenses were later adjudgd and determined and an adjustment made for [93] additional debts owing by the decedent but the claim for refund was rejected for the reason that the above amount of \$101,259.35, representing decedent's liability on the separation agreement of April 1, 1924, had been erroneously included as a deduction in the prior determination of the estate tax liability. The Commissioner's letter dated October 25, 1939, stated that this amount was

not a proper deduction under section 812(b) of the Internal Revenue Code. Petitioner has taken no action with regard to said claim and the same is now barred by the statute of limitations.

The gist of petitioner's argument that decedent's estate is entitled to a deduction of the \$9,600 paid to Ada Edwards Laughlin is that it is clear that if Homer Laughlin were living he would be entitled to the benefit of section 23(u), I.R.C.<sup>1</sup> Petitioner further argues that the payment of the \$9,600 in question is taxable to Ada E. Laughlin under the provisions of section 22(k), I.R.C.<sup>2</sup>

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<sup>1</sup>Sec. 23. Deductions from Gross Income.

In computing net income there shall be allowed as deductions:

\* \* \* \* \*

(u) Alimony, etc., Payments.—In the case of a husband described in section 22(k), amounts includible under section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under section 22(k), or section 171, stated to be not includible in such husband's gross income, no deduction shall be allowed with respect to such payment under this subsection.

<sup>2</sup>Sec. 22. Gross Income.

\* \* \* \* \*

(k) Alimony, etc., Income.—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or



Homer Laughlin, the husband, is now dead and his estate is in process of administration and therefore section 23(u) is not applicable.

Is the estate of Homer Laughlin entitled to the deduction of the \$9,600 the same as Homer would be entitled were he still living? Respondent contends the question should be answered no. He argues that inasmuch as the recent decisions allow as a deduction from a decedent husband's estate the commuted value of the claim for monthly payments to a wife for life under a decree of divorce for estate tax purposes, cf. *Estate of Pomeo M. Maresi*, 6 T. C. 583, affirmed ..... Fed. (2d) ....., such payments should not be allowed the estate as a deduction for income tax purposes. Respondent contends that if our Court should allow the petitioner's claim in this case it will be contrary to Regulations 111, section 29.162-1, printed in the margin.<sup>3</sup> He

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incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. \* \* \*

<sup>3</sup>Regulations 111.

Sec. 29.162-1. Income of Estates and Trusts.—In ascertaining the tax liability of the estate of a deceased person or of a trust, there are deductible from the gross income, subject to exceptions, the same deductions which are allowed to individual taxpayers. See generally section 23, and the provisions thereof governing the right of deduction for depreciation and depletion in the case of property

says that under the Maresi case the commuted value of the future payments to Homer Laughlin's divorced wife was deductible as an indebtedness of the estate. "Ordinarily" continues respondent, "the payment of a debt of a decedent does not furnish a foundation for an income tax deduction." At this point it may be remarked that although the estate of Homer Laughlin claimed as a deduction on the estate tax return the commuted value of the payments to be made to Ada Edwards Laughlin based on her life expectancy of 16 years, \$152,480, the Commissioner disallowed such deduction. The stipulated facts with reference to the course of that claimed deduction are given above. Petitioner does not claim, however, that the Commissioner is estopped from making his present contention because of any disallowance which he may have made of the claimed deduction for estate tax purposes. It seems plain there is no estoppel. Petitioner concedes that ordinarily the payment of a debt of a

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held in trust. Amounts allowable under section 812(b) as a deduction in computing the net estate of a decedent are not allowed as a deduction under section 23, except subsection (w), in computing the net income of the estate unless there is filed in duplicate with the return in which the item is claimed as a deduction a statement to the effect that the items have not been claimed or allowed as deductions from the gross estate of the decedent under section 812(b) and a waiver of any and all right to have such item allowed at any time as a deduction under section 812(b). For items not deductible, see section 24. Against the net income of the estate or trust there are allowable certain credits, for which see sections 25 and 163.

decedent by his estate does not furnish a foundation for an income tax deduction. Petitioner claims, however, that the estate of Homer Laughlin is entitled to deduct the \$9,600 in question because of certain definite statutory provisions to which we shall presently refer. Petitioner's argument on this phase of the issue is somewhat involved but we think we state it with substantial accuracy as follows:

Section 162, I.R.C. is applicable to the estates of decedents. Section 162(b) provides that there shall be allowed as a deduction in computing the net income of the estate the amount of the income for the taxable year which is to be distributed currently by the fiduciary to the legatee, heirs or beneficiaries, but the amount so allowed as a deduction shall be included in computing the net income of the legatees, heirs or beneficiaries whether [96] distributed to them or not. Section 171(b) of the Internal Revenue Code<sup>4</sup> provides that "for the purposes of computing the net income of the estate or

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<sup>4</sup>Sec. 171. Income of an Estate or Trust in Case of Divorce, etc. [Added by § 120, 1942 Act.]

(b) Wife Considered a Beneficiary.—For the purposes of computing the net income of the estate or trust and the net income of the wife described in section 22(k) or subsection (a) of this section, such wife shall be considered as the beneficiary specified in this supplement. A periodic payment under section 22(k) to any part of which the provisions of this supplement are applicable shall be included in the gross income of the beneficiary in the taxable year in which under this supplement such part is required to be included.

trust and the net income of the wife described in section 22(k) or subsection (a) of this section, such wife shall be considered as the beneficiary specified in this supplement.” Under section 22(k) a “wife” is an ex-wife “divorced \* \* \* from her husband” who is receiving periodic payments “in discharge of \* \* \* a legal obligation which \* \* \* is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce \* \* \*.” Ada Edwards Laughlin is therefore a “wife” described in section 22(k). Being such a wife she is the “beneficiary” specified in section 171(b) and as such the periodic payments to her are includible in her income and these payments are deductible by the estate under section 162(b). Such is petitioner’s argument.

Although respondent does not argue the meaning of section 171(b) in his brief, the Treasury Regulations are apparently in conflict with what the petitioner contends. Regulations 111, section 29.23(u)-1 provides in part: [97]

The deduction under section 23(u) is allowed only to the obligor spouse. It is not allowed to an estate, trust, corporation, or any other person who may pay the alimony obligation of such obligor spouse. \* \* \*

The legislative history of section 171(b) does not disclose that it was enacted to accomplish the purpose claimed by petitioner. In the Senate Finance Committee Report which accompanied the Revenue

Bill of 1942 it is said, among other things, with reference to section 171 included in that bill:

\* \* \* For the purpose of clarity, this section provides that the wife entitled to receive the payment is considered as the beneficiary of the trust. If these provisions of section 171(b) apply to any part of a periodic payment required under section 22(k) to be included in income of the beneficiary, the whole of such periodic payment shall be included in gross income of the beneficiary in the taxable year in which under the above provisions of section 171(b) such part is required to be included in her income. It is contemplated under these provisions that the trust or estate will be entitled to a deduction in computing its net income for amounts required to be included in the wife's income under section 22(k) or section 171 to the extent that such amounts are paid, credited, or to be distributed out of income of the estate or trust for its taxable year.

[Emphasis supplied.]

By a reference to the facts which we have given under this issue 2, it will be seen that the \$800 monthly which Homer Laughlin was to pay his divorced wife for her support and maintenance was to be paid in all events. If he had sufficient income with which to pay it, well and good. If on the contrary in any particular year he had no net income, the \$800 per month nevertheless had to be paid. Under these circumstances when Homer

Laughlin died and his estate had to continue to make the payments we do not think that it can be said that his divorced wife, Ada, was an income beneficiary of his estate to whom \$800 per month was currently distributable under section 162(b).

We think a reading of section 162(b) will disclose that petitioner's construction of the meaning of 171(b) is not correct. Section 162(b), I.R.C., as amended by the Revenue Act of 1942, reads as follows:

(b) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the legatees, heirs, or beneficiaries, but the amount so allowed as a deduction shall be included in computing the net income of the legatees, heirs, or beneficiaries whether distributed to them or not. As used in this subsection "income which is to be distributed currently" includes income for the taxable year of the estate or trust which, within the taxable year, becomes payable to the legatee, heir, or beneficiary. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection (c) of this section in the same or any succeeding taxable year;

As we have already indicated, if decedent's divorced wife Ada had been one to whom income was currently distributable by the estate, then it is

reasonable to believe that she would be a "beneficiary" of the estate as provided by section 171(b), upon which petitioner relies. However, there was no condition in the divorce settlement that the \$9,600 annually was to be paid to her out of income. Therefore, it seems to us that section 171(b) is not applicable to a situation such as we have here. When decedent died his estate was entitled to deduct for estate tax purposes, as indebtedness owing to Ada Edwards Laughlin the commuted value of the payments to be made to her for life. Cf. *Pomeo M. Maresi*, *supra*. Petitioner, the estate of Homer Laughlin, deceased, is not entitled by virtue of section 171(b), I.R.C. carried in the Revenue Act of 1942 to deduct from its net income the \$9,600 paid in the taxable year to Ada Edwards Laughlin. On this issue the respondent is sustained.

Reviewed by the Court.

Decision will be entered under Rule 50.

Disney, J., concurs only in the result.

[Seal] [99]

Opper, J., concurring:

The conclusion reached here seems to me entirely sound, but I am doubtful whether the first point is properly founded on *Blair v. Commissioner*, 300 U. S. 5. The scope of that opinion has been radically narrowed by *Harrison v. Schaffner*, 312 U. S. 579. Those two cases, as well as such decisions as *Helvering v. Horst*, 311 U. S. 112, deal with the vexatious and intricate question of the validity for

tax purposes of anticipatory and gratuitous transfers of future income. If decedent's assignment of the prospective rents without a conveyance of the property which produced them had been a gift, I think we should have had to deal with the question left open in *Harrison v. Schaffner*, since decedent concededly failed to part with the income for the full term of his estate, as in the *Blair* case. In the *Schaffner* case the Supreme Court said:

\* \* \* Even though the gift of income be in form accomplished by the temporary disposition of the donor's property which produces the income, the donor retaining every other substantial interest in it, we have not allowed the form to obscure the reality. \* \* \*

And as we pointed out in *Herbert R. Graf*, 45 B.T.A. 386:

\* \* \* The Court said in the last paragraph of the *Schaffner* opinion that future decisions will have to determine precisely where the line shall be drawn between gifts of income-producing property and gifts of income from property of which the donor remains the owner \* \* \*

When, however, we come to deal with transfers for a valuable consideration as in this case and in *Herbert R. Graf*, *supra*, a different situation arises. It is then "unnecessary to determine just exactly how many incidents of ownership \* \* \* were acquired \* \* \* since the taxing acts are not so much concerned with the refinements of title as with the



actual command over the income which is taxed and the actual benefit for which the tax is paid.” Herbert R. Graf, *supra*. [100]

A more satisfactory ground for the decision in the present proceeding would seem to me, by viewing the transaction as a whole, to recognize that the decedent had acquired a wasting asset for which he and his estate were entitled to take deductions for depreciation. In such a situation the payments received and the deductions allowed, being both for the life of the annuitant, would offset each other. *H. Edward Wolff*, 7 T. C. 717. And even though the petitioner estate happens to have been permitted a deduction based upon the annuitant’s claim, any basis thereby acquired for the estate is shown here to have been exhausted. The facts show that the amount allowed as a deduction for the annuitant’s claim was \$9,194.05. Making the reasonable assumption that the estate has paid the required \$1,200 each year for the nine years following decedent’s death, the total paid to the end of the year 1941 was \$10,800. Any benefit conferred upon the estate by the permitted deduction had thus been used up before the beginning of the present tax year, with the consequence that the process of exhaustion is continuing beyond the period for which any claim has been allowed. If the proposed deficiency were disapproved on that ground, the depreciation being exactly equal to the proposed addition to income, *H. Edward Wolff*, *supra*, there would have been no necessity for mentioning the compli-

cated question lurking in the Court's disposition of the first issue.

Murdock and Kern, JJ., agree with the above.

[Seal] [101]

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[Title of Tax Court and Cause.]

RESPONDENT'S COMPUTATION FOR  
ENTRY OF DECISION

The attached proposed computation is submitted, on behalf of the respondent, to The Tax Court of the United States, in compliance with its opinion determining the issues in this proceeding.

This computation is submitted in accordance with the opinion of the Court, without prejudice to the respondent's right to contest the correctness of the decision entered herein by the Court, pursuant to the statutes in such cases made and provided.

J. P. WENCHEL,  
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Bureau of Internal Revenue.

Of Counsel :

B. H. NEBLETT,  
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## RECOMPUTATION STATEMENT

Feb. 3, 1947

In re: Estate of Homer Laughlin, Deceased

Mr. Beach D. Lyon, Administrator

315 South Broadway

Los Angeles 13, California

Docket No. 5891

## Income Tax Liability

Year	Tax Liability	Tax Assessed	Deficiency
1942 .....	\$35,567.38	\$29,819.49	\$7,747.89

The following recomputation has been made under Rule 50 pursuant to the findings of The Tax Court of the United States, promulgated January 16, 1947.

## 1942 Net Income

Net income per statutory notice dated 6/6/44.....	\$67,203.18
As adjusted in accordance with Tax Court decision	66,003.18
Difference (decrease) .....	<u>\$ 1,200.00</u>

## Explanation of Adjustment

The Tax Court holds that the \$1,200.00, rent from the Laughlin Building which was paid to Ella West in accordance with written agreement between Homer Laughlin and Ella West, should be excluded from the income of petitioner.

## Computation of Tax

Adjusted net income .....	\$66,003.18
Less: Personal exemption .....	500.00
<hr/>	
Normal tax and surtax net income.....	\$65,503.18
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Normal tax at 6% on \$65,503.18.....	\$ 3,930.19
Surtax on \$65,503.18 .....	33,637.19
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Total income tax .....	\$37,567.38
Assessed, account number 37359 .....	29,819.49
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Deficiency .....	\$ 7,747.89
<hr/>	

HCLynn/bc

1/28/47

[Endorsed]: Received and filed Feb. 17, 1947.

The Tax Court of the United States  
Washington

Docket No. 5891.

ESTATE OF HOMER LAUGHLIN, Deceased,  
BEACH D. LYON, Administrator with the  
will annexed,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

DECISION

Pursuant to the determination of the Court as set forth in its Opinion promulgated January 16, 1947, the respondent herein filed a proposed recomputation on February 17, 1947, which was not contested by the petitioner when called for hearing March 26, 1947, now therefore, it is

Ordered and Decided: That there is a deficiency in income tax for the calendar year 1942 in the amount of \$7,747.89.

[Seal]     /s/ EUGENE BLACK,  
Judge.

Enter:

Entered Mar. 26, 1947. [104]

In the United States Circuit Court of Appeals for  
the Ninth Circuit

Tax Court Docket No. 5891.

ESTATE OF HOMER LAUGHLIN, Deceased,  
BEACH D. LYON, Administrator with will  
annexed,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent on Review.

PETITION FOR REVIEW AND ASSIGN-  
MENTS OF ERROR

To the Honorable Judges of the United States  
Circuit Court of Appeals for the Ninth Circuit:

Now comes the Estate of Homer Laughlin,  
Deceased, Beach D. Lyon, Administrator with the  
will annexed, by its attorneys Joseph D. Brady and  
Walter L. Nossaman, and respectfully shows:

I.

Jurisdiction

That the petitioner on review (hereinafter some-  
times referred to as the petitioner) is a probate  
estate in course of administration in the Superior  
Court of the State of California, in and for the  
County of Los Angeles, being Probate Cause No.  
132875 therein, and Beach D. Lyon is the duly ap-  
pointed, qualified and acting administrator with  
will annexed of said estate; the respondent on re-

view is the duly [105] appointed, qualified and acting Commissioner of Internal Revenue; the federal income tax return of the Estate of Homer Laughlin, deceased, for the taxable year 1942 was filed with the Collector of Internal Revenue for the Sixth District of California, located at Los Angeles, which collection district is within the jurisdiction of the Circuit Court of Appeals for the Ninth Circuit, wherein this review is sought. This petition for review is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

## II.

### Prior Proceedings

On June 6, 1944, respondent advised petitioner that the determination of its income tax liability for the taxable year 1942 disclosed a deficiency in tax in the sum of \$7,977.09. Thereafter on August 28, 1944, petitioner filed a petition with The Tax Court of the United States for a redetermination of the proposed deficiency. Respondent, thereafter in due course, filed his answer to the petition and the case was heard before the Tax Court on June 10, 1946, at Los Angeles, California. On January 16, 1947, the Tax Court promulgated its opinion and on March 26, 1947, it rendered its decision ordering and deciding that there is a deficiency in payment of the income tax of the Estate of Homer Laughlin, deceased, for the taxable year 1942 in the amount of \$7,747.89. [106]

## III.

## Nature of Controversy

The decedent, Homer Laughlin, who died December 27, 1932, had on April 1, 1924, entered into a property settlement agreement with his wife, Ada Edwards Laughlin, under the terms of which the decedent was required to pay to his wife \$800 per month during her life for her support and maintenance, the stipulated payments being expressly made the obligation of Homer Laughlin's estate if he should predecease Ada Edwards Laughlin. The property settlement agreement was approved and confirmed by interlocutory and final decrees thereafter made on September 24, 1924, and September 29, 1925, respectively, in a divorce suit brought by Ada Edwards Laughlin against Homer Laughlin.

In the taxable year 1942, petitioner paid Ada Edwards Laughlin \$9600 in accordance with the property settlement agreement and court decrees above mentioned. Petitioner contends that the \$9600 so paid by it to Ada Edwards Laughlin was deductible from its income for the year 1942. The right to this deduction was denied by the Tax Court.

## IV.

## Assignments of Error

The petitioner being aggrieved by the opinion and decision of The Tax Court of the United States in this proceeding, hereby petitions for a review of said opinion and [107] decision and for the correction of the errors which, as petitioner believes and alleges, occurred therein to the prejudice of peti-



tioner. The errors relied upon by the petitioner as the basis for this petition for review are as follows:

The Tax Court of the United States erred:

1. In holding and deciding that the sum of \$9600 paid by the petitioner to Ada Edwards Laughlin during the taxable year 1942 was not deductible for federal income tax purposes from the income of the petitioner for that year.

2. In holding and deciding that there was any deficiency in any sum whatever in the payment of the petitioner's federal income tax for the taxable year 1942.

3. In rendering an opinion and decision which, in the respects above enumerated, are contrary to the law and the regulations, and not supported by the evidence in the case.

Wherefore, petitioner prays that the findings of fact and opinion and decision of The Tax Court of the United States be reviewed by the Circuit Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in accordance with the law and the rules of said Court and be transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors herein complained of may be reviewed and corrected by said Court.

/s/ JOSEPH D. BRADY,

/s/ WALTER L. NOSSAMAN,

Counsel for Petitioner on  
Review.

[Endorsed]: Filed T.C.U.S., June 10, 1947.

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION  
FOR REVIEW

To the Honorable Joseph D. Numan, Jr.,  
Commissioner of Internal Revenue.

You are hereby notified that the Estate of Homer Laughlin, deceased, Beach D. Lyon, Administrator, with will annexed, did, on the 20th day of June, 1947, file with the Clerk of The Tax Court of the United States, at Washington, D.C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review and the assignments of error filed therewith is hereto attached and served upon you.

Dated this 20th day of June, 1947.

/s/ JOSEPH D. BRADY,

/s/ WALTER L. NOSSAMAN,

Counsel for Petitioner on  
Review.

Service of the foregoing notice, together with a copy of the petition for review and assignments of

error mentioned therein is acknowledged this 20th day of June, 1947.

JOSEPH D. NUNAN, JR.,  
Commissioner of Internal  
Revenue,  
Respondent on Review.

By J. P. WENCHEL, CAR  
Counsel.

[Endorsed]: Filed T.C.U.S. June 20, 1947. [110]

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[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH PETI-  
TIONER ON REVIEW INTENDS TO RELY

To Commissioner of Internal Revenue and to J. P.  
Wenchel, Chief Counsel, Bureau of Internal  
Revenue, and E. A. Tonjes, Esq.:

Please take notice that the Estate of Homer Laughlin, deceased, Beach D. Lyon, Administrator with will annexed, petitioner on review in the above-entitled cause, intends to rely on the review on the following points:

That the Tax Court of the United States erred:

1. In holding and deciding that the sum of \$9600 paid by the petitioner to Ada Edwards Laughlin during the taxable year 1942 was not deductible for federal income tax purposes from the income of the petitioner for that year.

2. In holding and deciding that there was any deficiency in any sum whatever in the payment of the petitioner's federal income tax for the taxable year 1942.

3. In rendering an opinion and decision [111] which, in the respects above enumerated, are contrary to the law and the regulations, and not supported by the evidence in the case.

/s/ JOSEPH D. BRADY,

/s/ WALTER L. NOSSAMAN,

Attorneys for Petitioner on  
Review.

Service of the foregoing is hereby acknowledged  
this 20th day of June, 1947.

COMMISSIONER OF INTER-  
NAL REVENUE,

Respondent on Review.

[Endorsed]: Filed T.C.U.S. June 20, 1947. [112]

By J. P. WENCHEL, CAR,

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF THE PORTIONS OF THE  
RECORD, PROCEEDINGS AND EVIDENCE  
TO BE CONTAINED IN THE  
RECORD ON REVIEW

To the Clerk of the United States Circuit Court  
of Appeals for the Ninth Circuit:

Please take notice that the Estate of Homer Laughlin, deceased, Beach D. Lyon, Administrator with will annexed, petitioner on review, hereby designates the entire record in the above-entitled proceeding which the petitioner on review thinks necessary for the consideration of the United States Circuit Court of Appeals for the Ninth Circuit on review of the decision of the Tax Court of the United States in said proceeding entered on March 26, 1947. Said record consists of the following documents and records:

1. Docket entries of the proceeding.
2. Pleadings:
  - (a) Petition, including annexed Exhibit A (copy of deficiency [113] notice with statement attached); also Exhibits B and C.
  - (b) Answer.
3. Opinion.
4. Commissioner's Rule 50 Computation filed February 17, 1947.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 3rd day of July, 1947.

[Seal]        /s/ VICTOR S. MERSCH, EMT  
Clerk, The Tax Court of the  
United States.

[Endorsed]: No. 11686. United States Circuit Court of Appeals for the Ninth Circuit. Estate of Homer Laughlin, Deceased, Beach D. Lyon, Administrator with the will annexed, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed July 14, 1947.

              /s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

No. 11686.

IN THE

United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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Estate of HOMER LAUGHLIN,

Deceased,

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BEACH D. LYON, Administrator with the will annexed,  
*Petitioner,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

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PETITIONER'S OPENING BRIEF.

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JOSEPH D. BRADY,

WALTER L. NOSSAMAN,

c/o Brady & Nossaman  
433 South Spring Street  
Los Angeles 13,

*Attorneys for Petitioner,*

FILED

AUG 28 1947

PAUL P. O'BRIEN,

CLERK





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### STATUTES

#### Internal Revenue Code :

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#### Regulations 111 :

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No. 11686.

IN THE

United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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Estate of HOMER LAUGHLIN,

Deceased,

---

BEACH D. LYON, Administrator with the will annexed,  
*Petitioner,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

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PETITIONER'S OPENING BRIEF.

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**Opinion Below.**

The opinion of the Tax Court is reported in 8 T. C. 33. A copy is printed in the Record, at pages 90 to 116.

**Jurisdiction.**

This petition for review [R. 120-123] involves an asserted deficiency in income taxes for the taxable year 1942. The notice of deficiency is dated June 6, 1944 [R. 12]. The taxpayer's petition for redetermination was filed with the Tax Court of the United States August 25, 1944 [R. 20] under the provisions of Section 272 of the Internal Revenue Code. The decision of the Tax

Court determining that there was a deficiency in income tax for the year 1942 in the amount of \$7,747.89 was entered on March 26, 1947 [R. 119]. The case is brought to this Court by a petition for review filed by the taxpayer on June 20, 1947 [R. 126], pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code, the return of the tax in respect of which the claimed liability arises having been made to the Collector's office for the Sixth District of California [R. 4].

### **Question Presented.**

Taxpayer, during the year 1942, paid \$9,600.00 to Ada Edwards Laughlin, divorced wife of the decedent Homer Laughlin, pursuant to a contract entered into between decedent and Ada Edwards Laughlin, incident to the divorce, providing for payment to Ada Edwards Laughlin of \$800.00 per month for her life, in discharge of the decedent's legal obligation of support. The decedent's estate, the present petitioner, contends that the \$9,600.00 payment is deductible from the estate's income (Sections 22(k), 23(u), 171(b), Internal Revenue Code). The denial of this deduction by the Commissioner and the Tax Court is the occasion of this petition for review.

### **Statutes Involved.**

The statutes involved are Sections 22(k), 23(u), 162(b), 162(d), 171(a), and 171(b), Internal Revenue Code. These statutes, or the parts thereof deemed necessary for the decision of this case, are set out in the appendix.

### Statement of the Case.

On April 1, 1924, Homer Laughlin (sometimes referred to as Homer Laughlin, Jr.), and his then wife, Ada Edwards Laughlin, entered into a property settlement agreement [Ex. F; R. 53]. An action for divorce was instituted in the Superior Court, Los Angeles County, by Ada E. Laughlin shortly thereafter against Homer Laughlin, an interlocutory decree being entered on September 24, 1924, followed by final decree, September 29, 1925. The decrees [Ex. G; R. 67] approve and confirm the property settlement agreement, the final decree setting it forth in *haec verba* [R. 68].

The \$800.00 per month agreed to be paid by Homer Laughlin to Ada E. Laughlin during her life (to be reduced to \$300.00 per month if she remarried—an event which has never happened) were made, as the agreement [Ex. F, par. 1; R. 53] shows, for her support and maintenance. It was stipulated that Homer Laughlin, Jr., had no substantial amount of community property at the time of the April 1, 1924, agreement, or at any time thereafter during the continuance of the marriage between him and Ada Edwards Laughlin, his holdings consisting of property given to him by or inherited by him from his father, Homer Laughlin, Sr.<sup>1</sup>

The stipulated payments to Mrs. Laughlin were expressly made an obligation of Homer Laughlin's estate [Ex. F, par. 10; R. 65]. The \$9,600.00 payment made

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<sup>1</sup>The above statement is made in view of the fact that the property settlement agreement [Ex. F, pars. 6 and 7; R. 58, 59] contains customary recitals whereby each party released any interest in the property of the other and the wife released any interest in the community property.

during the year in question, 1942, was made by petitioner pursuant to the agreement of April 1, 1924, and the divorce decrees [R. 36].

Homer Laughlin died on December 27, 1932 [R. 32]. Beach D. Lyon is, and during the year 1942 was, administrator with will annexed of his estate [R. 4, 12].

Further facts relating to an alleged deduction of the Ada E. Laughlin claim for estate tax purposes in the estate of Homer Laughlin, deceased, will be referred to in an appropriate connection (see p. 16, *infra*).

### **Specification of Errors.**

Petitioner respectfully submits that the Tax Court erred,

1. In holding and deciding that the sum of \$9,600.00 paid by the petitioner to Ada Edwards Laughlin during the taxable year 1942 was not deductible for federal income tax purposes from the income of the petitioner for that year.

2. In holding and deciding that there was any deficiency in any sum whatever in the payment of the petitioner's federal income tax for the taxable year 1942.

3. In rendering an opinion and decision which, in the respects above enumerated, are contrary to the law and the regulations, and not supported by the evidence in the case.

### Summary of Argument.

Section 22(k), Internal Revenue Code, provides for including in the income of a divorced wife, periodic payments made in discharge of a legal obligation arising out of the marital relationship which is imposed upon the husband by the divorce decree or a written instrument incidental thereto. The coordinate provisions of Section 23(u) allow a deduction to the husband, of such payments. Section 22(k) in the concluding sentence refers to Section 171(b) for the rule governing cases “where such periodic payments are attributable *to property of an estate or property held in trust*” (emphasis supplied). Section 171(b) expressly states that “for the purposes of computing *the net income of the estate or trust* and the net income of the wife,” the latter “shall be considered as the beneficiary specified in this supplement”—that is, payments to her are deductible under Section 162(b), being given the tax status of “income \* \* \* which is to be distributed currently by the fiduciary to the legatees, heirs or beneficiaries” (Sec. 162(b)).

## Argument.

We shall discuss the case under two main headings, namely

I. Effect of Sections 22(k), 171(b) and Related Sections.

II. Effect of Certain Proceedings Had in Determining the Estate Tax on Homer Laughlin's Estate.

Taking up these points in order:

### I.

#### Effect of Section 22 (k), 171 (b) and Related Sections.

Preliminarily, it is clear that if Homer Laughlin were living he would be entitled to the benefits of Section 23(u), allowing a deduction to the husband for amounts includible in the wife's income under Section 22(k). We have here a case of a wife "who is divorced \* \* \* from her husband under a decree of divorce." (Sec. 22(k).) The payments are made "in discharge of \* \* \* a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce."

Except in one respect which will be noted below, the payments come within the strictest interpretation of the Commissioner's own regulations. See Regs. 111, Sec. 29.22(k)-1(a), *infra*, p. 9. No part of the payments is attributable to "any interest in property transferred in discharge of the husband's obligation under the decree or instrument incident thereto, which interest originally belonged to the wife." (Reg. Sec. 29.22(k)-1(b).)



It is agreed [R. 38] that Homer Laughlin, Jr., did not possess at the time of the settlement agreement of April 1, 1924 [Ex. F; R. 53] or at any time thereafter during the subsequent brief period of his marriage to Ada Edwards Laughlin, any substantial amount of community property.

The question of property rights does not enter into this controversy, the sums in question being payable, as paragraph 1 of the contract provides, "for the support and maintenance" of the wife. Apropos of a similar contract, the Tax Court has said, in *Lewis Cass Ledyard*, C. C. H. Dec. 15,087(M), T.C., Mar. 20, 1946 (app. dism., C. C. A. 2):

"\* \* \* The fact that the Fourth Paragraph contains mutual releases of dower and other property rights does not justify the conversion of a part of a fund provided for maintenance and support into a payment for release of such rights. The mutual releases have no apparent connection with the settlement of the wife's rights to maintenance and of the obligation of petitioner to support his minor child."

The payments of \$800.00 per month made during 1942 would clearly have been deductible by Homer Laughlin (Int. Rev. Code, Sec. 23(u)) and included in Ada's income (Sec. 22(k)), if Homer had been alive during 1942.

What is the effect of Homer Laughlin's death? Is his estate, now the payor, entitled to deduct these payments?

The answer is, Yes, if Ada Laughlin is a "beneficiary" as that term is used in Supp. E (Estates and Trusts), Sections 161-172, Internal Revenue Code.

Section 171(b), Internal Revenue Code, provides:

“WIFE CONSIDERED A BENEFICIARY.—For the purposes of computing the net income of the *estate* or trust and the net income of the *wife* described in section 22(k) or subsection (a) of this section, such *wife* shall be considered as the beneficiary specified in this supplement. A periodic payment under section 22(k) to any part of which the provisions of this supplement are applicable shall be included in the gross income of the beneficiary in the taxable year in which under this supplement such part is required to be included.” (Emphasis supplied.)

Now a Section 22(k) “wife” is, *inter alia*, by definition, an ex-wife “divorced \* \* \* from her husband,” receiving periodic payments “in discharge of \* \* \* a legal obligation which \* \* \* is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce \* \* \*.”

Ada Laughlin qualifies under that definition. She is “divorced from” her husband. She is receiving “periodic payments.” These are made “in discharge of” the husband’s legal obligation under the decree. Ada Laughlin is therefore a “wife described in section 22(k)” (Sec. 171(b)). Being such a wife, she is “the beneficiary specified” in Supp. E, of which Section 171(b) is a part. Being such beneficiary, she is chargeable with the tax on such “income.” As a necessary consequence, the payments are deductible by the estate under Section 162(b).

Section 171(b), we submit, is susceptible of no other construction. Had it referred only to *trusts*, the rule might be different. But the rule that the “wife” is the “beneficiary” applies both to estates and trusts. The term

*estate* has no meaning unless it is construed as referring to the estate of a deceased husband who was subject to the liabilities (of support and maintenance) imposed upon him by divorce decree or by agreement incident thereto. The term *wife* is not an abstraction. It connotes husband. The use of the word *estate* contemplates that the husband's estate, a legal entity and the continuation of his legal personality, succeeds him for the purposes of the statute. Succeeding him and bearing his burdens, it stands in his shoes, is entitled to his deductions.

What is inequitable or even strange in this result? Congress could hardly have made its intent clearer, although it might have chosen words more carefully than to speak of the *beneficiary* of an *estate*. But the context must be considered. Congress in Section 171(b) is speaking of the "income of the estate or trust." Obviously, it would not do to speak of a divorced wife receiving alimony as a legatee or heir (Sec. 162(b), (c)). It was thought sufficient to say that such a wife "shall be considered" as a beneficiary, even of an estate (171(b)). There seems to be no objection to *considering* her in that light; that is, awarding her the benefits and subjecting her to the burdens which result from the status of being the *beneficiary* of an *estate*, to the extent, and with the effect, specified in the statute.

Section 29.22(k)-1(a) of Reg. 111 is in harmony with the above. It provides (in part):

"Periodic payments are includible in the wife's income under section 22(k) only for the taxable year in which received by her. As to such amounts, the wife is to be treated as if she makes her income tax returns on the cash receipts and disbursements basis, regardless of whether she normally makes such re-

turns on the accrual basis. However, if the periodic payments described in section 22(k) *are to be made by an estate* or trust, such periodic payments are to be included in the wife's taxable year in which they are includible according to the rules as to income of estates and trusts provided in sections 162, 164 and 171(b), *whether or not such payments are made out of the income of such estates or trusts.*" (Emphasis supplied.)

To be compared with the foregoing is the following from Reg. 111, Section 29.23(u)-1 (in part):

"The deduction under section 23(u) is allowed only to the obligor spouse. It is not allowed to an estate, trust, corporation, or any other person who may pay the alimony obligation of such obligor spouse. \* \* \*"

Reg. 111, Section 29.171-2, applicable to Internal Revenue Code, Section 171(b), does not deal with—it ignores—payments by estates.

Possibly the apparent conflict between Sections 29.22(k)-1(a) and 29.23(u)-1 of the regulations can be reconciled. It may be that in 29.23(u)-1, in speaking of an estate, trust, etc., as not being entitled to the deduction, the Treasury did not think it necessary to except the plain case *where the estate of the deceased husband* makes the payments. The Treasury may not have thought it necessary to deny that it was withholding a privilege which the statute expressly grants. As a responsible agency of the government, it may have assumed that no one would attribute to it an intent to nullify an act of Congress.

We think the Treasury is entitled to the benefit of the construction above suggested. If we are wrong in this, if Section 29.23(u)-1 does say that the estate of a *deceased husband*, obligated to make the payments, is not entitled to the deduction, we believe it to be in conflict not only with the coordinate regulation, Section 29.22(k)-1(a), but with Section 171(b), Internal Revenue Code. The latter obviously must prevail over all inconsistent regulations and rulings. (*Manhattan General Equipment Co. v. Commissioner*, 297 U. S. 129, 80 L. Ed. 528, 56 S. Ct. 397; *Koshland v. Helvering*, 298 U. S. 441, 80 L. Ed. 1268, 56 S. Ct. 767.) It requires, we submit, the the taxpayer be allowed as a deduction the \$9,600.00 paid to Ada Edwards Laughlin in 1942.

We shall now refer to the reasons advanced by the learned Tax Court for upholding the claimed deficiency.

Petitioner's argument on this point in the Tax Court is summarized at pages 43 and 44 of 8 T. C. The Tax Court's answer to this argument is dependent entirely on the proposition that the Laughlin agreement did not require that the \$9,600.00 be paid out of income.

We agree as to the fact, but not as to its consequences. The Tax Court's holding overlooks, we submit, the effect of Section 162(d), Internal Revenue Code, added in 1942. That section provides, in part:

"In cases where the amount paid, credited, or to be distributed can be paid, credited, or distributed out of other than income, the amount paid, credited, or to be distributed (except under a gift, bequest, devise, or inheritance not to be paid, credited, or dis-

tributed at intervals) during the taxable year of the estate or trust shall be considered as income of the estate or trust which is paid, credited, or to be distributed if the aggregate of such amounts so paid, credited, or to be distributed does not exceed the distributable income of the estate or trust for its taxable year. \* \* \*

In support of its conclusion, the Tax Court quotes [p. 44 of 8 T. C.; R. 111] from the report of the Senate Finance Committee (1942-2 C. B. 569) which accompanied the revenue bill later enacted into law. Following is the whole of the paragraph in question, including the opening sentence, not quoted in the Tax Court's opinion:

“The general rules for accounting for the income of a trust *or estate*, prescribed in Supplement E of Chapter 1, apply to that part of any periodic payment which is a distribution of income of the trust *or estate* and which is required under section 22(k) or section 171(a) to be included in the income of the individual receiving such payment. For the purpose of clarity, this section provides that the wife entitled to receive the payment is considered as the beneficiary of the trust. If these provisions of section 171(b) apply to any part of a periodic payment required under section 22(k) to be included in income of the beneficiary, the whole of such periodic payment shall be included in gross income of the beneficiary in the taxable year in which under the above provisions of section 171(b) such part is required to be included in her income. It is contemplated under these pro-

visions that the trust *or estate will be entitled to a deduction* in computing its net income for amounts required to be included in the wife's income under section 22(k) or section 171 *to the extent that such amounts are paid, credited, or to be distributed out of income of the estate or trust for its taxable year.*" (Emphasis supplied.)

The effect of this, we submit, is the exact opposite of the inference which the Tax Court draws from it. The Senate Finance Committee was referring to the new concept introduced into the law by the Revenue Act of 1942, whereby a beneficiary entitled to benefits not limited to income becomes, for the first time, conclusively regarded as a recipient of, and taxable upon, income to the extent that the stipulated payments do not exceed the distributable income of the estate or trust (Sec. 162(d), Int. Rev. Code, quoted above, page 11), overruling *Helvering v. Pardee*, 290 U. S. 365, 78 L. Ed. 365, 54 S. Ct. 221; and *Burnet v. Whitehouse*, 283 U. S. 148, 75 L. Ed. 916, 51 S. Ct. 374.

The Senate Committee report shows that the Committee recognized the effect of its handiwork in the respect now under consideration. In the opening sentence of the excerpt quoted above, the Committee gives express recognition to the fact that Supplement E to Chapter 1 (Secs. 161-173, Int. Rev. Code) applies not only to trusts but to estates. The "beneficiary" of an estate as well as of a trust is required to pay the tax on the income. An "estate" as well as a trust is entitled to the deduction.

The Tax Court's opinion, in the respect now under consideration, is contrary to Regulations 111, Section 29.22(k)-1(a), quoted above, page 9. In that section of the Regulations the Commissioner correctly says that periodic payments are to be included in the wife's income "whether or not such payments are made out of the income of such *estates or trusts*."

In the case at bar the income of the estate was abundantly ample to permit the \$9,600.00 to be paid out of income. As the record shows, the net income of the estate for 1942 as adjusted by respondent, was \$67,203.18 [R. 16]—slightly more than seven times the amount required to be paid Mrs. Laughlin. This, we submit, brings the case squarely within the coordinate 1942 amendments to Section 162(b) and 171(b), giving the payments the exact status they would have had if required to be paid out of income, and making applicable the following excerpt from the Tax Court's opinion, page 45 of 8 T. C.:

"As we have already indicated, if decedent's divorced wife, Ada, had been one to whom income was currently distributable by the estate, then it is reasonable to believe that she would be a 'beneficiary' of the estate as provided by section 171(b), upon which petitioner relies."

We feel that we should not detain the Court with a discussion of academic problems. If we had no income, we should not need the deduction, in fact, we would not be here. The right to the deduction under such circumstances, existing only *in vacuo*, would have only a specu-



lative interest. We are willing to accept the limitation suggested by the Tax Court, that the deduction applies only to the extent that Ada Laughlin can be paid out of income (Sec. 162(d), Int. Rev. Code). The recognition of this principle in no way affects the result.

It is proper to say that petitioner had no means of anticipating, and no opportunity to meet, the specific arguments on which the Tax Court relies in denying the deduction. As the Tax Court says [p. 44 of 8 T. C.; R. 110], respondent did not argue the meaning of Section 171(b) in that Court. Respondent's typewritten brief in the Tax Court disposed of this particular deduction in less than a page and a half, contending only that the deduction was barred because "in practical effect, the estate has been allowed a substantial deduction for estate tax purposes."<sup>2</sup>

Respondent being silent on the principal question herein involved, the Tax Court was compelled to dispose of the matter without such assistance as petitioner might otherwise have been able to give on reply. This may account for the failure, as we see it, of the Tax Court to give full effect to the implications of the coordinated legislative program (Secs. 22(k), 23(u), 162(d), 171(b)) on which we rely here.

---

<sup>2</sup>Among "Statutes and Regulations Involved," respondent quoted, without comment, Secs. 22(k), 23(u), 162(b), 171(a) and (b), and 812(b)(3), Internal Revenue Code; also Regs. 111, Secs. 29.162-1 and 29.22(k)-1.

II.

**Effect of Certain Proceedings Had in Determining the Estate Tax on Homer Laughlin's Estate.**

The following are the facts regarding this matter. In Homer Laughlin's estate tax return, a deduction of \$152,480.00 was claimed on account of the Ada Edwards Laughlin indebtedness, which respondent reduced to \$101,259.35 [R. 36]. Certain items of expense of administration having been omitted, petitioner filed a claim for refund [R. 37], the correctness of which respondent admitted by making an adjustment [R. 37], but nevertheless rejected the claim on the alleged ground that the \$101,259.35 liability on the Ada Edwards Laughlin contract had been erroneously deducted in determining the estate tax liability. No further action was taken by either party regarding these matters [R. 37].

The allowance to the estate of Homer Laughlin, Jr., of a deduction on account of the Ada Edwards Laughlin claim was at least partially nullified by the Commissioner's later action in denying the estate an admittedly proper refund. The net advantage to the estate of the Commissioner's mistake, if it was a mistake, in permitting the deduction of the Ada Edwards Laughlin claim was therefore materially reduced.

The present case stands, we submit, on its own merits, unaffected by past errors. All that is water over the dam. We may concede the general correctness of respondent's statement, quoted by the Tax Court (p. 43 of 8 T. C.), that "Ordinarily the payment of a debt of a decedent by his estate does not furnish a foundation for an income tax deduction." Paraphrasing this statement, in fact going somewhat further, we may say that "Ordi-

narilly the payment of a debt \* \* \* does not furnish the foundation of an income tax deduction” to anyone. We do not “found” any claim to an income tax deduction on the ground that the Commissioner erroneously failed to give us the full benefit of an estate tax deduction. Our case is not predicated on the Commissioner’s past errors in unrelated, or only remotely related, matters. Nor can the Commissioner prevail here because the estate obtained a part of the estate tax deduction to which it was entitled on account of Mrs. Laughlin’s claim. He could not prevail if the estate had obtained that benefit *in toto*. It cannot be too strongly emphasized that here we are dealing with no ordinary situation. Section 22(k) “income” is income, even though paid out of principal (Reg. 111, Sec. 29.22(k)-1 pars. (a) and (b)). The “husband,” when he makes such payments during his lifetime, is *discharging a debt*. But he is entitled to a deduction for the payments because the statute so provides.

How is the deceased husband’s estate, under a continuing liability for the payments, in any different situation? The obligation, being a debt, is deductible for estate tax purposes (*Estate of Maresi*, 6 T. C. 583, affd., 156 F. (2d) 929 (C. C. A. 2)). *But the obligation was a debt to the husband while living*. If, as the statute expressly says, a living husband, owing a debt, is nevertheless entitled to deduct payments made on it, there is nothing impossible or even strange in giving his estate a like deduction for payments made out of income, when the estate is subject to the identical burden.

It will not do to speak in generalities here. We are dealing with a new concept, somewhat revolutionary in theory, and have only to determine the extent of the relief (to payors on the one hand) and of the corresponding

burden (to payees, on the other) which Congress intended to grant or to impose by the 1942 legislation (Secs. 22(k), 23(u), 171(b), Int. Rev. Code). The intention of Congress was to deal with this matter effectively, and in a large way, even going so far as to tax as "income" payments which are not income at all in any economic sense, and anomalously allowing a deduction to a man for paying a debt. Laying aside preconceptions based on the "ordinary" situations to which the above quoted statement of respondent seemingly refers, and viewing the 1942 legislation on this subject as a harmoniously consistent program, we believe that the consequences pointed out under our first heading follow.

It should be noted that the rule of *Dobson v. Commissioner*, 320 U. S. 489, 88 L. Ed. 248, 64 S. Ct. 239, is not applicable here. There is no question of fact involved in this case. The only question is one of law, namely, whether the statute requires the deduction of the payments here in question.

### Conclusion.

We respectfully submit that the decision of the Tax Court should be reversed and the deficiency expunged.

Respectfully submitted,

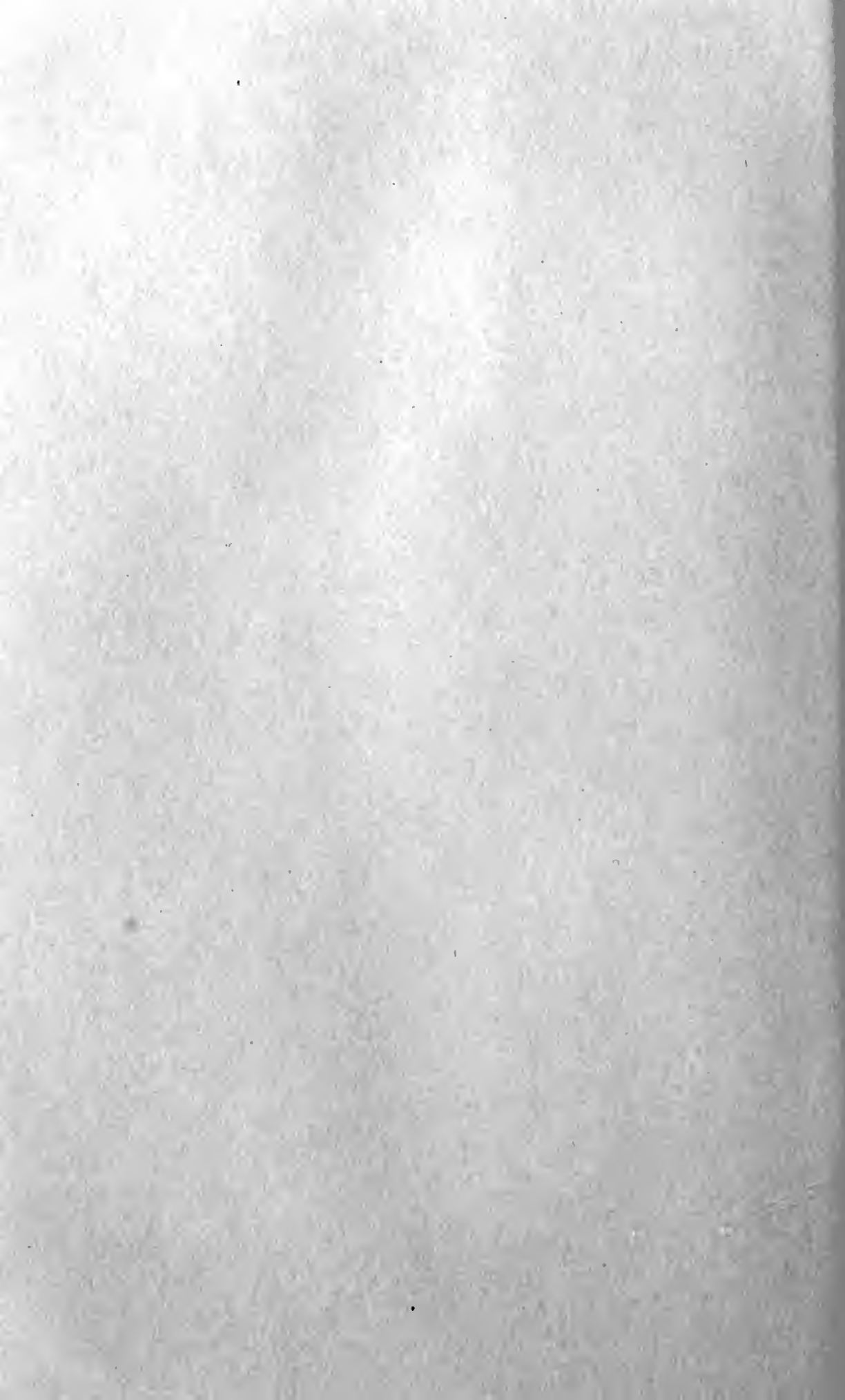
JOSEPH D. BRADY,

WALTER L. NOSSAMAN,

*Attorneys for Petitioner,*

August 20, 1947.





## APPENDIX.

Statutes involved.

Internal Revenue Code.

### SEC. 22. GROSS INCOME.

\* \* \* \* \*

(k) (in part) ALIMONY, ETC., INCOME.—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. \* \* \*

### SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

\* \* \* \* \*

(11) ALIMONY, ETC., PAYMENTS.—In the case of a husband described in section 22(k), amounts includible under section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under section 22(k) or section 171, stated to be not includible in

such husband's gross income, no deduction shall be allowed with respect to such payment under this subsection.

\* \* \* \* \*

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

\* \* \* \* \*

(b) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the legatees, heirs, or beneficiaries, but the amount so allowed as a deduction shall be included in computing the net income of the legatees, heirs, or beneficiaries whether distributed to them or not. As used in this subsection, "income which is to be distributed currently" includes income for the taxable year of the estate or trust which, within the taxable year, becomes payable to the legatee, heir, or beneficiary. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection (c) of this section in the same or any succeeding taxable year;

\* \* \* \* \*

(d) RULES FOR APPLICATION OF SUBSECTIONS (B) AND (C).—For the purposes of subsections (b) and (c)—

(1) (in part) AMOUNTS DISTRIBUTABLE OUT OF INCOME OR CORPUS.—In cases where the amount paid, credited, or distributed can be paid, credited, or distributed



out of other than income, the amount paid, credited, or to be distributed (except under a gift, bequest, devise, or inheritance not to be paid, credited, or distributed at intervals) during the taxable year of the estate or trust shall be considered as income of the estate or trust which is paid, credited, or to be distributed if the aggregate of such amounts so paid, credited, or to be distributed does not exceed the distributable income of the estate or trust for its taxable year.

\* \* \* \* \*

SEC. 171. INCOME OF AN ESTATE OR TRUST IN CASE OF DIVORCE, ETC.

\* \* \* \* \*

(a) INCLUSION IN GROSS INCOME.—There shall be included in the gross income of a wife who is divorced or legally separated under a decree of divorce or of separate maintenance the amount of the income of any trust which such wife is entitled to receive and which, except for the provisions of this section, would be includible in the gross income of her husband, and such amount shall not, despite section 166, section 167, or any other provision of this chapter, be includible in the gross income of such husband. This subsection shall not apply to that part of any such income of the trust which the terms of the decree or trust instrument fix, in terms of an amount of money or a portion of such income, as a sum which is payable for the support of minor children of such husband. In case such income is less than the amount specified in the decree or instrument, for the purpose of applying the preceding sentence, such income, to the extent of such sum payable for such support, shall be considered a payment for such support.

(b) WIFE CONSIDERED A BENEFICIARY.—For the purposes of computing the net income of the estate or trust and the net income of the wife described in section 22(k) or subsection (a) of this section, such wife shall be considered as the beneficiary specified in this supplement. A periodic payment under section 22(k) to any part of which the provisions of this supplement are applicable shall be included in the gross income of the beneficiary in the taxable year in which under this supplement such part is required to be included.

Reg. 111, Sec. 29.22(k)-1 (in part): ALIMONY AND SEPARATE MAINTENANCE PAYMENTS—INCOME TO FORMER WIFE.—(a) (in part) *In general*.—Section 22(k) provides rules for treatment in certain cases of payments in the nature of or in lieu of alimony or an allowance for support as between spouses who are divorced or legally separated under a court order or decree. For convenience, the payee spouse will hereafter in this section of the regulations be referred to as the “wife” and the spouse from whom she is divorced or legally separated as the “husband.” See section 3797(a)(17).

In general, section 22(k) requires the inclusion in the gross income of the wife of periodic payments (whether or not made at regular intervals) received by her after the decree of divorce or of separate maintenance. Such periodic payments may be received from either of the two following sources:

(1) In discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by the husband, or

(2) Attributable to property transferred (in trust or otherwise) in discharge of a legal obligation which, be-

cause of the marital or family relationship, is imposed upon or incurred by the husband.

The obligation of the husband must be imposed upon him or assumed by him (or made specific) under either of the following:

(1) A court order or decree divorcing or legally separating the husband and wife, or

(2) A written instrument incident to such divorce or legal separation.

\* \* \* \* \*

Periodic payments are includible in the wife's income under section 22(k) only for the taxable year in which received by her. As to such amounts, the wife is to be treated as if she makes her income tax returns on the cash receipts and disbursements basis, regardless of whether she normally makes such returns on the accrual basis. However, if the periodic payments described in section 22(k) are to be made by an estate or trust, such periodic payments are to be included in the wife's taxable year in which they are includible according to the rules as to income of estates and trusts provided in sections 162, 164, and 171(b), whether or not such payments are made out of the income of such estates or trusts.

(b) (in part) *Alimony income attributable to property.*—The full amount of periodic payments received under the circumstances described in section 22(k) is required to be included in the gross income of the recipient whether such amounts are derived, in whole or in part, from income received or accrued by the source to which such payments are attributable. Thus, it matters not that such payments are attributable to property in trust, to life insurance, endowment, or annuity contracts, or to any

other interest in property, or are paid directly or indirectly by the obligor husband from his income or capital. For example, if in order to meet an alimony obligation of \$500 a month, the husband purchases or assigns for the benefit of his former wife a commercial annuity contract paying such amount, the full \$500 a month received by the wife is includible in her income, and no part of such amount is includible in the husband's income or deductible by him. See sections 22(b)(2)(A) and section 29.22(b)(2)-4. Likewise, if property is transferred by the husband, subject to an annual charge of \$5,000, payable to his former wife in discharge of his alimony obligation under the divorce decree, the \$5,000 received annually is, under section 22(k), includible in the wife's income, regardless of whether such amount is paid out of income or principal of the property.

The same rule applies to periodic payments attributable to property in trust. The full amount of periodic payments to which section 22(k) applies is includible in the wife's income, regardless of whether such payments are made out of trust income.

\* \* \* \* \*

Section 22(k) does not apply to that part of any periodic payment attributable to that portion of any interest in property transferred in discharge of the husband's obligation under the decree or instrument incident thereto, which interest originally belonged to the wife. It will apply, however, if she receives such interest from her husband in contemplation of or as an incident to the divorce or separation without adequate and full consideration in money or money's worth, other than the release of the husband or his property from marital obligations. \* \* \*

No. 11686

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**In the United States Circuit Court of Appeals  
for the Ninth Circuit**

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**ESTATE OF HOMER LAUGHLIN, DECEASED, BY BEACH D.  
LYON, ADMINISTRATOR WITH THE WILL ANNEXED,  
PETITIONER**

**v.**

**COMMISSIONER OF INTERNAL REVENUE, RESPONDENT**

---

**ON PETITION FOR REVIEW OF THE DECISION OF THE TAX  
COURT OF THE UNITED STATES**

---

**BRIEF FOR THE RESPONDENT**

---

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**FILED**

**FEB 2 1948**





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**In the United States Circuit Court of Appeals  
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No. 11686

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v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

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*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX  
COURT OF THE UNITED STATES*

---

**BRIEF FOR THE RESPONDENT**

---

**OPINION BELOW**

The opinion of the Tax Court and the concurring opinion (R. 90-116) are reported in 8 T. C. 33.

**JURISDICTION**

This case involves a deficiency in federal income tax for the year 1942, asserted by respondent against taxpayer estate in the original amount of \$8,647.89 by notice of deficiency mailed on June 6, 1944. (R. 4, 12.) Taxpayer's petition for redetermination was filed within ninety days thereafter on August 25, 1944 (R. 4, 20), pursuant to Section 272 of the Internal Revenue Code. The decision of the Tax Court finding

a deficiency in the amount of \$7,747.89 was entered on March 26, 1947. (R. 119.) Taxpayer's petition for review was filed on June 20, 1947 (R. 124-125), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

#### QUESTION PRESENTED

Is the estate of Homer Laughlin entitled to deduct from its 1942 taxable income the amount paid to Ada Edwards Laughlin pursuant to the latter's separation agreement with decedent dated April 1, 1924?

#### STATUTE AND REGULATIONS INVOLVED

The pertinent parts of the statute and Regulations are set out in the Appendix, *infra*.

#### STATEMENT

The facts as stipulated by the parties (R. 30-38) and as contained in the opinion of the Tax Court (R. 90-113) may be summarized as follows:

Homer Laughlin, a resident of Los Angeles, died on December 27, 1932. (R. 32, 91.) Beach D. Lyon was appointed administrator with the will annexed of decedent's estate on February 4, 1933. (R. 32-33.) The estate is still in process of administration. (R. 91.)

In 1942, taxpayer's estate paid to decedent's divorced wife and claimed as a deduction on its fiduciary income tax return the sum of \$9,600, accounted for as "Ada Edwards Laughlin—Property settlement agreement with Homer Laughlin—\$800.00 per month for life." (R. 36, 76, 104.) This deduction was

disallowed by respondent. (R. 16-17, 30-31.) Respondent's determination on this issue was sustained by the Tax Court (R. 113), and the disallowance of this deduction presents the only issue on this appeal (R. 120-126).

In its federal estate tax return, Schedule I, "Debts of Decedent," taxpayer had previously claimed as a deduction the commuted value of the payments (as of the date of decedent's death) to be made to Ada Edwards Laughlin based on her life expectancy (R. 36, 108) as follows (R. 105):

Indebtedness in favor of Ada Edwards Laughlin, in pursuance of Property Settlement Agreement, dated April 1, 1924, approved by Decree of Superior Court of the State of California, in and for the County of Los Angeles, and secured as a lien on the building, subject to Trust Deed in favor of Metropolitan Life Insurance Co. (To return \$9600.00) Expectancy 16 years, \$152,480.00.

Respondent, on audit, reduced this amount to \$101,259.35. (R. 36) On October 22, 1938, taxpayer filed claim for refund of estate tax in the amount of \$2,500, based on certain omitted expense items. (R. 69.) On an audit report dated October 25, 1939, this claim for refund was rejected because, on recomputation, respondent excluded "\$101,259.35 representing decedent's liability on the separation agreement with his wife which was erroneously included as a deduction in the prior determination of the tax liability of the estate." (R. 37, 69-70, 105.) Such recomputation resulted in a net deficiency, but

respondent has made no assessment in this regard, and taxpayer's claim for refund is now barred by the statute of limitations. (R. 37, 71, 106.)

Taxpayer's claim for these deductions arises from an agreement of April 1, 1924, between decedent and Ada Edwards Laughlin, which was ratified, approved and confirmed by a final judgment of divorce entered September 29, 1925, by the Los Angeles Superior Court. (R. 35, 53-68, 104.) This agreement, after reciting that the parties "have been living separate and apart," and their purpose to determine all existing and future property rights between themselves, provides in part that the decedent (R. 54)—

covenants and agrees to pay to the party of the second part [Ada Edwards Laughlin] for her support and maintenance the sum of Eight Hundred Dollars (\$800) per month during the term of her natural life; provided, however, that if the parties hereto should be divorced at any time in the future, and in such event the party of the second part should remarry, said monthly payments shall be reduced to the sum of Three Hundred Dollars (\$300) per month.

The agreement releases decedent from support, maintenance, and alimony, as well as all other claims against him or his estate (R. 59-60) but the obligation to make payments is specifically made binding on his estate (R. 64-65).

Ada Edwards Laughlin, under the agreement also (R. 59-60)—

releases, renounces and relinquishes all right and claim which she has or might have to any

share in the estate of the said party of the first part [Homer Laughlin] in case of his decease, and to inherit from him in the state of California, or elsewhere, \* \* \* and the right to dower \* \* \* [and] to an allowance from his estate of any kind or nature whatsoever, excepting the payments and the property rights herein provided for.

The agreement provides that the Homer Laughlin Building in Los Angeles is “hypothecated as security for the faithful performance” of the agreement, especially for the payments of \$800 per month. (R. 61, 103.) The agreement contained provisions allowing decedent to create a trust fund, or to furnish an insurance policy, as security in lieu of the Homer Laughlin Building, but no action was taken under these options. (R. 61-63, 103-104.)

During his lifetime, Homer Laughlin paid \$800 per month to Ada Edwards Laughlin as provided in the agreement, and pursuant to the agreement and the divorce decrees, taxpayer similarly paid the sum of \$9,600 in 1942. (R. 36, 104-105.)

#### SUMMARY OF ARGUMENT

Properly construed, the 1942 amendments to the Code relied on by taxpayer do not allow an income tax deduction for the monthly payments made to Ada Edwards Laughlin. Section 22 (k) of the Code is the basic and governing provision. This section involves payments in the nature of or in lieu of alimony, i. e., payments for support, includible in the ex-wife's income and deductible, through the link to Section 162 (b) provided by Section 171 (b), from the income

of estates and trusts. However, the present payments are not for support, nor are they in the nature of or in lieu of alimony. In the statutory language, they should not be considered payments in discharge of a legal obligation "imposed upon or incurred by" the taxpayer "because of the marital or family relationship." Rather, they are payments of a general contract obligation entered into by the decedent ex-husband, and a debt of the estate which is properly to be taken as an estate tax deduction. During decedent's lifetime, the payments are admittedly in the nature of, or in lieu of, alimony. After his death they should be considered in the nature of, or in lieu of, the dower and similar property rights in his estate which were given up by Mrs. Laughlin. They are annuity payments rather than alimony payments. This construction harmonizes with the construction of the situation made for estate and gift tax purposes, and with the local law as to the duration of the husband's obligation to support. A contrary interpretation would necessarily involve some conflict.

Moreover, the present claim is for a deduction as to which, through the taking of the commuted value of the obligation for an estate tax deduction, the taxpayer has already received a tax benefit. It is thus a situation within the ambit of Section 162 (e) of the Code prohibiting double deductions in estate tax and income tax for the same items.

Whether the payments made to Ada Edwards Laughlin are includible in her taxable income is a question not now before this Court and should be reserved.

## ARGUMENT

## I

The "alimony provisions" do not apply to, or grant a deduction for, payments made by the estate of a deceased ex-husband on account of a general contract obligation to the divorced spouse

For the purposes of general orientation, several uncontroverted points are stated first. This taxpayer is an estate in the process of administration (R. 91), and in general it is subjected to tax like an individual, tax being paid by the fiduciary. Internal Revenue Code, Sections 161 (a) (3), 162; Regulations 111, Sections 29.161-1, 29.162-1. Taxpayer here seeks an income tax deduction, and has the burden of showing clear provision therefor. *New Colonial Co. v. Helvering*, 292 U. S. 435, 440; *Helvering v. Ohio Leather Co.*, 317 U. S. 102, 106; *Lamm Lumber Co. v. Commissioner*, 133 F. 2d 433, 434 (C. C. A. 9th). On the issue now in question, respondent has asserted a deficiency, the Tax Court has determined a deficiency, and there is no cause for reversal unless taxpayer makes out a statutory right to the claimed deduction. *White v. United States*, 305 U. S. 281, 292; *Empire Trust Co. v. Commissioner*, 94 F. 2d 307 (C. C. A. 4th). Cf. *Meyer's Estate v. Commissioner*, 110 F. 2d 367, 369 (C. C. A. 2d), certiorari denied, 310 U. S. 651, a case which involves the disallowance of estate tax deductions on account of payments to decedent's divorced wife.

It is also uncontroverted that the deduction claimed by taxpayer must have its proximate source in Section

162 (b) of the Code (Appendix, *infra*), which provides in pertinent part:

There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the legatees, heirs, or beneficiaries, but the amount so allowed as a deduction shall be included in computing the net income of the legatees, heirs, or beneficiaries whether distributed to them or not. \* \* \*

Section 162 (b) thus makes certain distributions to “legatees, heirs, or beneficiaries” deductible by the estate. Ada Edwards Laughlin is clearly not a “legatee”, nor an “heir” of the Laughlin estate. Is she a “beneficiary” thereof? Taxpayer contends that she is constituted such a beneficiary by the 1942 amendments to the Code relating to alimony, while the Government contends that these provisions do not cover the present case.

The critical connection between Section 162 (b) deductions, and the basic alimony provisions, is made by Section 171 (b) of the Code (Appendix, *infra*), which provides in pertinent part:

For the purposes of computing the net income of the estate or trust and the net income of the wife described in ~~Section~~ 22 (k) or subsection (a) of this section, such wife shall be considered as the beneficiary specified in this supplement. [i. e., Supplement E of the Internal Revenue Code, dealing with taxation of estates and trusts, of which Section 162 (b) is a part.]



The purpose of this provision is explained as follows in the Senate Finance Committee Report (S. Rep. No. 1631, 77th Cong., 2d Sess., p. 837 (1942-2 Cum. Bull. 569) :

It is contemplated under these provisions that the trust or estate will be entitled to a deduction in computing its net income for amounts required to be included in the wife's income under section 22 (k) or section 171 to the extent that such amounts are paid, credited, or to be distributed out of income of the estate or trust for its taxable year.

Thus, Section 171 (b) refers the present inquiry back to the terms of Sections 22 (k) and 171 (a) of the Code (Appendix, *infra*)—also added by the Revenue Act of 1942 as a part of the “alimony” revisions—to learn whether or not Ada Edwards Laughlin is a “wife” described in those sections, and required to include the present payments in her taxable income.<sup>1</sup> If so, then it is conceded that Section 171 (b) makes her a “beneficiary specified in this supplement” (i. e., a Section 162 (b) “beneficiary”), payments to whom are proper income tax deductions as claimed by taxpayer. Section 171 (b), however, does not lay down a “rule” (Pet. Br. 8) that all payments to divorced wives by the estates of deceased ex-husbands are payments to Section 162 (b) “beneficiaries”. Obviously, for instance, repayments of principal loaned by the

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<sup>1</sup> Note that the possibility that other and different provisions require her to include these receipts in taxable income is not presently in point. A deduction is provided only if the inclusion is caused by Sections 22 (k) or 171 (a). Cf. Argument, *infra*.

wife to such an estate would not be deductible from estate income for tax purposes. Regulations 111, Section 29.22 (k)-1 (a), next to last paragraph (Appendix, *infra*). We proceed to examine the basic provisions referred to.

Section 171 (a) applies only to "the amount of the income of any trust" receivable by a wife "divorced or legally separated under a decree of divorce or of separate maintenance." The present case does not involve a trust. It does not involve a specific fund, or corpus, set over to the wife, and the existence of a lien on the Laughlin Building is not material in this regard. *Commissioner v. Smiley*, 86 F. 2d 658, 659 (C. C. A. 2d). Section 171 (a) is therefore not in point.

Section 22 (k) is the governing section. It provides that in the case of a "wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance", there shall be included in her income and not included in the gross income of her "husband":

\* \* \* periodic payments (whether or not made at regular intervals) received subsequent to such decree *in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband* \* \* \*. [Italics supplied.]

Section 29.22 (k)-1 of Regulations 111 follows and interprets this provision. It is entitled "Alimony and Separate Maintenance Payments—Income to Former Wife." In pertinent part, it provides:

(a) *In general.* Section 22 (k) provides rules for treatment in certain cases of payments in the nature of or in lieu of alimony or an allowance for support as between spouses who are divorced or legally separated under a court order or decree. \* \* \*

\* \* \* \* \*

Section 22 (k) applies only where the legal obligation being discharged arises out of the family or marital relationship in recognition of the general obligation to support, which is made specific by the instrument or decree. \* \* \*

Equally and to the same effect, the Committee Reports state the kind of "legal obligation" meant by Section 22 (k). For instance, H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 71, 72 (1942-2 Cum. Bull. 372) states:

\* \* \* Periodic payments \* \* \* in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation are defined by section 22 (k) as gross income of the wife. This section applies only when the legal obligation being discharged arises out of the family or marital relationship in *recognition of the general obligation to support*, which is made specific by the instrument or decree. \* \* \*  
[Italics supplied.]

The same statement is repeated in the Senate Report. S. Rep. No. 1631, *supra*, pp. 83-84. And see

Gornick, *Alimony and the Income Tax*, 29 Cornell L. Q. 28 (1943).

It is the Government's position that the estate of Homer Laughlin owes Mrs. Laughlin no obligation "in the nature of or in lieu of alimony" (*cf.* H. Rep. No. 2333, *supra*, p. 71; S. Rep. No. 1631, *supra*, p. 83), and no obligation in the nature of "support". The estate of Homer Laughlin owes Mrs. Laughlin a general contract obligation, or annuity, in the nature of a substitute for dower rights which she gave up in the contract of April 1, 1924. This obligation is clearly distinguishable from the right of a wife to support during her husband's lifetime—the substitute for which is "alimony". "Under a decree of divorce or legal separation a husband's duty to support a divorced wife (alimony) customarily lasts only during the joint lives of the parties or until the divorced wife remarries." E. T. 19, 1946-2 Cum. Bull. 166, 168; citing II Vernier, *American Family Laws* (1932, and Supp. 1938). In the present case, then, the obligation being fulfilled has outlasted the husband's life, and it is no "alimony" or ~~a~~ "support" obligation. Regulations 111, Section 29.22 (k)-1 (a); *Kalchthaler v. Commissioner*, 7 T. C. 625, 627, emphasizing a slightly different Committee statement to the same effect; Committee Reports;<sup>2</sup> Rudick, *Marriage, Divorce and Taxes*, 2 Tax Law Rev. 123, 145 (1946).

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<sup>2</sup> S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 83-87 (1942-2 Cum. Bull. 569). The Senate discussion supplements but is otherwise identical with H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 71-74 (1942-2 Cum. Bull. 372).

The California law, which determines the status of the parties and their property rights after a decree dissolving the matrimonial bonds (*Helvering v. Fuller*, 310 U. S. 69, 74), is fully in accord with the distinction here made between payments of alimony or “support” obligations, and payments of general estate obligations. In *Parker v. Parker*, 193 Cal. 478, 225 Pac. 447, the husband, as in the present case, was required by the divorce decree of the California court to pay the wife a certain sum each month for her natural life, secured by a lien on the husband’s interest in certain real property. The court held that the alimony obligation is one (pp. 480–481)—

to support the wife, and that obligation comes to an end upon the death of either spouse. So, regardless of the language used by a court in making a provision in its decree for the payment of alimony, that provision ceases to be effective upon the death of either spouse. But here we have a provision based upon an agreement of the parties, in effect a contract. It is not an award of permanent alimony, but an award of a life annuity given in lieu of a division of the property of the spouses. It rests not upon the obligation which the law imposes upon a husband to support his wife, but upon the contract of the parties thereto. \* \* \*

It was further held in the *Parker* case (p. 481) that the provisions “create an annuity of fifty dollars per month to the wife for the period of her natural life.” See also, *Roberts v. Higgins*, 122 Cal. App. 170, 9 P. 2d 517.

Under California law, then, the Laughlin estate is now making payments to Ada Edwards Laughlin under a contract obligation, which are not payments in lieu of alimony nor in discharge of an obligation to support. In California, separation settlements such as the present one are not subject to later modification by court action, and the right to unaccrued alimony stops with the death of the person directed to pay (*Miller v. Superior Court*, 9 Cal. 2d 733, 72 P. 2d 868), although (72 P. 2d at 871):

The parties may by contract provide for monthly payments during the lifetime of the wife, and in such event she has a claim against the husband's estate for payments due after his death.

The construction of Section 22 (k) here contended for will be consistent with the treatment accorded to separation agreement obligations under the estate and gift tax laws, separating the "support" element in a single transfer, which is not taxed, from dower and other elements, which are capitalized and taxed. Following *Merrill v. Fahs*, 324 U. S. 308, and *Commissioner v. Wemyss*, 324 U. S. 303, the basic rule for estate and gift taxation of transfers other than for support is laid down in E. T. 19 (*supra*), the syllabus of which follows:

Transfer of property pursuant to an agreement incident to a divorce or legal separation are not made for an adequate and full consideration in money or money's worth to the extent that they are made in consideration of a relinquishment or promised relinquishment of

dower, courtesy, or of a statutory estate created in lieu of dower or courtesy, or other marital rights in the transferor's property or estate; to the extent that the transfers are made in satisfaction of support rights the transfers are held to be for an adequate and full consideration. The value of relinquished support rights shall be ascertained on the basis of the facts and circumstances of each individual case.

The text of the ruling continues (p. 169) :

An agreement of the parties may provide for payments extending beyond the period of their joint lives. The required allocation in such a case will involve a determination of the question whether the aggregate amounts paid and payable exceed normal support rights, which ordinarily would terminate upon the death of the husband. \* \* \*

Equally, the division between separation agreement transfers fulfilling the "support" obligation, and transfers representing the cost of buying off the wife's property interests in the husband's estate, i. e., "allocated to the relinquishment of survivorship rights" (Rudick, *supra*, p. 151) is recognized in Tax Court estate and gift tax cases. In *Mitchell v. Commissioner*, 6 T. C. 159, 164-165, the Tax Court said:

The duty of a husband to provide his wife with support and maintenance is not dependent upon contract or the ownership of property. It is a public duty owed to the state, as well as the wife, with criminal sanctions frequently imposed by statute for violation. By obtaining the discharge of this legal obligation, the peti-

tioner was relieved of making continuing cash expenditures for years to come. This, in our opinion, constitutes consideration in money or money's worth within the meaning of the statute \* \* \* and in no sense represents a gift.

See also, *Ledyard v. Commissioner*, decided March 20, 1946 (1946 P-H T. C. Memorandum Decisions, par. 46,071); Rudick, *supra*, pp. 158-163. The facts of the present case clearly and definitely show the release by Mrs. Laughlin of dower and other property rights, under the agreement of April 1, 1924, "excepting the payments and the property rights herein provided for." (R. 59-60). ~~Statement, *supra*.~~ The present case, then, in harmony with the estate and gift tax consequences, the indications from the Committee Reports and the Regulations, and the applicable California law, is one in which a single settlement agreement has in legal effect for tax purposes provided for two successive kinds of payments:

(a) During Homer Laughlin's lifetime, payments of \$800 per month in the nature of or in lieu of alimony. These payments discharge the husband's support obligation. They are therefore deductible, whether made by the husband, or from estate or trust funds, by the payor, and are includible in the wife's return, under the new alimony provisions. Internal Revenue Code, Sections 22 (k), 23 (u) and 171 (b).

(b) After Homer Laughlin's death, payments of \$800 per month in the nature of an annuity, fulfilling a general contract obligation in lieu of dower and similar property rights. These payments are not related



to the husband's support obligation. They are therefore not Section 22 (k) payments referred to in Section 171 (b), and are not deductible by the estate of the deceased husband.

For a case under prior law in which such a division was made "for reasons of practical administration," see *Thomas v. Commissioner*, 100 F. 2d 408, 410 (C. C. A. 2d). In estimating the practical results (*Nichols v. Coolidge*, 274 U. S. 531, 541) and effect of adopting taxpayer's position, on estate administration, it is noted that if payments measured by the wife's lifetime are deductible from estate income, then in order to obtain the benefit of the deduction, the process of administration of the estate must be continued indefinitely, until the wife's death, and distribution and settlement must be similarly delayed. In practice, if income tax deductibility is denied, the annuity will be disposed of by settlement between the estate and the annuitant. Cf. Paul, *Studies in Federal Taxation* (Third Series), p. 288; and the Ella West annuity settlement made by decedent on August 1, 1921. (R. 92-93.)

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This is a case of first impression on the new alimony provisions, the decision and *rationale* of which may affect other taxpayers, future tax years, and certain 1942 revisions of the Code other than the "alimony" revisions. For this reason, the Government makes the following incidental notes to its main argument, above:

1. *Uniformity*.—The general purpose of the alimony amendments is, to "produce uniformity in the treat-

ment of amounts paid in the nature of or in lieu of alimony regardless of variance in the laws of different States concerning the existence and continuance of an obligation to pay alimony.” S. Rep. No. 1631, *supra*, p. 83; H. Rep. No. 2333, *supra*, p. 72. The rule of *Douglas v. Willcuts*, 296 U. S. 1, is thus changed, and “alimony” is now taxable to the wife, whether under state law the obligation to support remains on the husband, or only on property settled on the wife. *Young v. Hassett*, 68 F. Supp. 943, 946 (Mass.); Gornick, *supra*, p. 51. The Government makes no argument against a liberal uniform rule for payments in the nature of or in lieu of alimony, but claims only that the present specific situation is outside the coverage of the uniform rule.

2. *Taxability of Mrs. Laughlin*.—The taxability of Ada Edwards Laughlin on the payments made to her by the Laughlin estate is not a question before the Court on the present record. The only question now for decision is, whether or not the estate has demonstrated its right to a deduction from taxable income for payments made to her. In *Daggett v. Commissioner*, 128 F. 2d 568, 575 (C. C. A. 9th), certiorari denied, 317 U. S. 673, this Court said:

We are not concerned here with any argument based on the fact that the deceased husband paid the tax on the income \* \* \* or with the speculation that the estate might still be required to pay a tax on the income of the trust. There are instances where, under certain situations, both parties have been required to pay income tax on the earnings of the trust,

but such speculations are not our problem. \* \* \*

Thus, the Government contends that taxpayer has *not* established that the payments in question are includible in Mrs. Laughlin's income *by virtue of Section 22 (k) of the Code*, which taxpayer must show to establish her position as a Section 171 (b) and a Section 162 (b) "beneficiary", payment to whom supports a deduction. Whether or not such payments are includible in Mrs. Laughlin's income by virtue of other Code provisions and general principles apart from the "alimony" innovations, is reserved.<sup>3</sup>

3. *Relationship of new Section 162 (d) to present issues.*—If, contrary to the Government's contention, Ada Edwards Laughlin is considered to be receiving "alimony" payments within the coverage of Section 22 (k) of the Code, then it is conceded that she is, under Section 171 (b), constituted a Section 162 (b) "beneficiary". The facts in the present case show that the payments in question were made to her

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<sup>3</sup> The point, however, is a connected one, and is briefly noted for the Court as follows: On the one hand, E. T. 19, *Merrill v. Fahs*, *Commissioner v. Wemyss*, and a series of Tax Court cases cited by Rudick, all *supra*, indicate that the estate obligation results from a gift to Mrs. Laughlin as of April 1, 1924; not income in nature until the commuted value of her survival expectancy has been realized by her. The same result occurs if the payments are considered to be in the nature of a *Whitehouse* annuity. *Burnet v. Whitehouse*, 283 U. S. 148. On the other hand, the annuity now enjoyed by Mrs. Laughlin being unrelated to "support" after the ex-husband's death, may be considered taxable to her under the rule of *Pearce v. Commissioner*, 315 U. S. 543, and *Thomas v. Commissioner*, *supra*.

from estate income. (R. 16.) Therefore, on the same hypothesis, a further concession is made that the accounting rule provided for Section 162 (b) and (c) cases by Section 162 (d) applies to give the estate the deduction in question, despite prior law (e. g., *Helvering v. Pardee*, 290 U. S. 365, 370) as to non-deductibility of estate obligations unless specifically charged on estate income. Regulations 111, Section 29.22 (k)-1 (a), last paragraph. The essential point, however, is that new Section 162 (d) applies only to payments made to Section 162 (b) and (c) "legatees, heirs, or beneficiaries." The enactment and existence of Section 162 (d) has no bearing on the present question as to whether or not Mrs. Laughlin is, by the alimony provisions, constituted such a "beneficiary".

4. *Regulations 111, Sec. 29.23 (u)-1.*—This Regulation (Appendix, *infra*) provides, in pertinent part, that:

The deduction under section 23 (u) is allowed only to the obligor spouse. It is not allowed to an estate, trust, corporation, or any person who may pay the alimony obligation of such obligor spouse \* \* \*.

Although taxpayer in the present case is an estate claiming a deduction for payments to a divorced spouse, the Government places no reliance on the above provision, and submits that it is not relevant to the present question as to the coverage of the alimony provisions. Section 23 (u) of the Code applies to payments made by living ex-husbands, and the Regula-

tion quoted above is intended only to make it clear that third parties cannot take over and obtain deductions for the living spouse's obligation. In the present case, taxpayer seeks a deduction under Section 162 (b) of the Code, and not under Section 23 (u) thereof. Estate and trust deductions are governed by Sections 162 and 171 of the Code, and separated in treatment under the legislative plan indicated in the Committee Reports (S. Rep. No. 1631, *supra*, p. 85; H. Rep. No. 2333, *supra* p. 73) and in the Regulations, Sections 29.23 (u)-1, 29.22 (k)-1 (a). This plan contemplates that deductions and inclusions in the husband-wife case will be exclusively a matter of cash receipts and disbursements, whereas in the estate or trust case, constructive current receipt or disbursement) of the two situations was thus projected for accounting reasons.

## II

**The estate has had the benefit of an estate tax deduction for the Ada Edwards Laughlin obligation and should not be allowed an income tax deduction for the same item**

The facts summarized in the Statement, *supra*, and the Commissioner's deficiency letter of October 25, 1939 (R. 69-71), show that the estate has received a tax benefit to the extent of \$5,954.94 by reason of a claimed deduction for the commuted value of the Ada Edwards Laughlin obligation. Such deduction, as reduced on audit, amounted to \$101,259.35. (R. 36, 105). Although the "net advantage" of the deduction was lessened by the later rejection of a claim for refund (R. 105; Pet. Br. 16), a deduction was in practical

effect taken.<sup>4</sup> Taxpayer does not claim that the record of a formal “disallowance”, not followed by proceedings to collect a deficiency, estops the respondent from making the present contention; and as found by the Tax Court (R. 108), “It seems plain there is no estoppel”.

The general rule, as usually applied in cases when both deductions are reflected in income tax returns, is that double deductions for the same item are not allowable. *Cf. Ilfeld Co. v. Hernandez*, 292 U. S. 62, 68. The reason for the rule, as applied in the present case, is that the capitalization and deduction of the obligation to Mrs. Laughlin has already reflected the diminution of estate assets caused by such obligation, and such diminution should not be reflected again in connection with the estate’s income tax.

Section 162 (e) of the Internal Revenue Code, added by Section 161 (a) of the Revenue Act of 1942, provides:

Amounts allowable under section 812 (b) as a deduction in computing the net estate of a decedent shall not be allowed as a deduction under section 23, except subsection (w), in computing the net income of the estate unless there is filed, within the time and in the manner and form prescribed by the Commissioner, a statement that the items have not been claimed or allowed as deductions under section 812 (b) and a waiver of the right to have such items

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<sup>4</sup> A computation made from figures as to the amount of refund disallowed, the gross estate, and other facts in the deficiency letter show that the estate tax deduction, in effect allowed, amounted to \$84,234.22.

allowed at any time as deductions under section 812 (b).

As originally drafted, this provision only covered disallowance of double deductions in the case of Section 23 (a) (2) income tax deductions for non-trade or non-business expenses. H. Rep. No. 2333, *supra*, p. 75. It was broadened by the Senate Finance Committee to apply to all deductions under Section 23 except subsection (w). S. Rep. No. 1631, *supra*, p. 136.

The estate in the present case has filed no statement under Section 162 (e) waiving the right to have the Ada Edwards Laughlin obligation allowed as a deduction under Section 812 (b) for estate tax purposes. Accordingly, the income tax deduction is prohibited if: (1) a deduction is allowable under Section 812 (b), which it is (*Commissioner v. Maresi*, 156 F. 2d 929 (C. C. A. 2d); E. T. 19, *supra*); and (2) the present claim is for "a deduction under Section 23".

This second condition should be read in accordance with the purpose of Congress and the general statutory plan of the 1942 amendments. The general purpose of Section 162 (e) is to prevent the taking of deductions in computing net income of an estate for amounts allowable as deductions in computing the estate tax under Section 812 (b). *Estate of C. M. Sutton v. Commissioner*, decided March 21, 1946 (1946 P-H T. C. Memorandum Decisions, par. 46,070); 6 Mertens, Law of Federal Income Taxation, 1947 Cum. Pocket Supp., Sec. 36.62. The rule of Section 162 (e) thus supplements the preexisting rule of Section 812 (b) that disallows double deductions for in-

come and estate tax purposes of "losses incurred during the settlement of estates arising from fires, storms, shipwrecks, <sup>or</sup> other casualties, or from theft, when such losses are not compensated for by insurance or otherwise". It is clear, therefore, that Section 162 (e) was added to the Code in furtherance of the general principle that double deductions should not be permitted for the estate tax and income tax with respect to the same obligation or loss. The present case is within that general principle, and the reference to deductions "under Section 23" should be read in accordance with the statutory scheme for allowance of deductions for alimony payments. Section 23 (u) provides for the deduction of payments taxable to the wife under Section 22 (k). Section 23 (u), therefore, states the general rule, basic to the alimony provisions, that a deduction should be allowed to the payor with respect to amounts which are required to be included in the wife's income under Section 22 (k). However, where the payments are made by an estate or trust, special rules which exist with respect to estate or trust accounting, as provided in Section 162, should be taken into account in determining the deduction by the estate or trust. Section 171 (b) is the link between Sections 22 (k), 23 (u) and 162 whereby the deduction is allowed an estate or trust for the periodic payments required to be included in the wife's income under Section 22 (k). Accordingly, the deduction here claimed by the Laughlin estate for payments to Mrs. Laughlin under Section 162 is the deduction provided for in Section 23 (u), as made applicable by Sections 171 and 162. The introductory clause of Section 162



identifies deductions thereunder with Section 23 deductions by providing that "the net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual", with certain exceptions. Accordingly, the present deduction can be considered within the ambit of Section 162 (e), since it is of the same type and character as the Section 23 (u) deduction, although in form taken under Section 162 (b).

This interpretation of Section 162 (e) makes for consistent treatment of alimony claims and other claims as deductions and for a coordinated plan of alimony deductions as between the income tax and the estate tax. Any other construction opens up a loop-hole for double deductions, which should not be considered the intent of Congress.

#### CONCLUSION

The decision of the Tax Court should be affirmed.

Respectfully submitted.

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JANUARY 1948.

## APPENDIX

### Internal Revenue Code:

#### SEC. 22. GROSS INCOME.

\* \* \* \* \*

(k) [as added by Sec. 120 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Alimony, Etc., Income*.—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. \* \* \*

\* \* \* \* \*

(26 U. S. C. 1940 ed., Sec. 22.)

#### SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

\* \* \* \* \*

(u) [as added by Sec. 120 (b) of the Revenue Act of 1942, *supra*] *Alimony, Etc., Payments*.—In the case of a husband described in section 22 (k), amounts includible under section 22 (k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is,

under section 22 (k) or section 171, stated to be not includible in such husband's gross income, no deduction shall be allowed with respect to such payment under this subsection.

\* \* \* \* \*

(26 U. S. C. 1940 ed., Sec. 23.)

#### SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

\* \* \* \* \*

(b) [as amended by Sec. 111 (b) of the Revenue Act of 1942, *supra*] There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the legatees, heirs, or beneficiaries, but the amount so allowed as a deduction shall be included in computing the net income of the legatees, heirs, or beneficiaries whether distributed to them or not. As used in this subsection, "income which is to be distributed currently" includes income for the taxable year of the estate or trust which, within the taxable year, becomes payable to the legatee, heir or beneficiary. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection (c) of this section in the same or any succeeding taxable year;

\* \* \* \* \*

(d) [as added by Sec. 111, Revenue Act of 1942, *supra*] *Rules for Application of Subsections (b) and (c).*—For the purposes of subsections (b) and (c)—

(1) *Amounts Distributable Out of Income or Corpus.*—In cases where the amount paid, credited, or to be distributed can be paid, credited, or distributed out of other than income, the

amount paid, credited, or to be distributed (except under a gift, bequest, devise, or inheritance not to be paid, credited, or distributed at intervals) during the taxable year of the estate or trust shall be considered as income of the estate or trust which is paid, credited, or to be distributed if the aggregate of such amounts so paid, credited, or to be distributed does not exceed the distributable income of the estate or trust for its taxable year.

\* \* \* \* \*

(e) [as added by Sec. 161 (a), Revenue Act of 1942, *supra*] Amounts allowable under section 812 (b) as a deduction in computing the net estate of a decedent shall not be allowed as a deduction under section 23, except subsection (w), in computing the net income of the estate unless there is filed, within the time and in the manner and form prescribed by the Commissioner, a statement that the items have not been claimed or allowed as deductions under section 812 (b) and a waiver of the right to have such items allowed at any time as deductions under section 812 (b).

(26 U. S. C. 1940 ed., Sec. 162.)

SEC. 171 [as added by Sec. 120 (c) of the Revenue Act of 1942, *supra*] INCOME OF AN ESTATE OR TRUST IN CASE OF DIVORCE, ETC.

(a) *Inclusion in Gross Income*.—There shall be included in the gross income of a wife who is divorced or legally separated under a decree of divorce or of separate maintenance the amount of the income of any trust which such wife is entitled to receive and which, except for the provisions of this section, would be includible in the gross income of her husband, and such amount shall not, despite section 166, section 167, or any other provision of this chapter, be includible in the gross income of such husband. This subsection shall not apply to that part of any such income of the trust which the terms of the decree or trust instrument fix,

in terms of an amount of money or a portion of such income, as a sum which is payable for the support of minor children of such husband. In case such income is less than the amount specified in the decree or instrument, for the purpose of applying the preceding sentence, such income, to the extent of such sum payable for such support, shall be considered a payment for such support.

(b) *Wife Considered a Beneficiary*.—For the purposes of computing the net income of the estate or trust and the net income of the wife described in section 22 (k) or subsection (a) of this section, such wife shall be considered as the beneficiary specified in this supplement. A periodic payment under section 22 (k) to any part of which the provisions of this supplement are applicable shall be included in the gross income of the beneficiary in the taxable year in which under this supplement such part is required to be included.

(26 U. S. C. 1940 ed., Sec. 171.)

#### SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

\*                      \*                      \*                      \*                      \*

(b) *Expenses, Losses, Indebtedness, and Taxes*.—Such amounts—

\*                      \*                      \*                      \*                      \*

(3) for claims against the estate,

\*                      \*                      \*                      \*                      \*

(26 U. S. C. 1940 ed., Sec. 812.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.22 (k)-1. *Alimony and Separate Maintenance Payments—Income to Former Wife*.—(a) *In general*.—Section 22 (k) provides rules for treatment in certain cases of

payments in the nature of or in lieu of alimony or an allowance for support as between spouses who are divorced or legally separated under a court order or decree. For convenience, the payee spouse will hereafter in this section of the regulations be referred to as the “wife” and the spouse from whom she is divorced or legally separated as the “husband.” See section 3797 (a) (17).

In general, section 22 (k) requires the inclusion in the gross income of the wife of periodic payments (whether or not made at regular intervals) received by her after the decree of divorce or of separate maintenance. Such periodic payments may be received from either of the two following sources:

(1) In discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by the husband, or

(2) Attributable to property transferred (in trust or otherwise) in discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by the husband.

The obligation of the husband must be imposed upon him or assumed by him (or made specific) under either of the following:

(1) A court order or decree divorcing or legally separating the husband and wife, or

(2) A written instrument incident to such a divorce or legal separation.

The periodic payments received by the wife attributable to property so transferred and includible in her income are not to be included in the gross income of the husband. See also section 29.171-1 in cases where such periodic payments are attributable to property held in trust.

\* \* \* \* \*

Section 22 (k) applies only where the legal obligation being discharged arises out of the family or marital relationship in recognition of

the general obligation to support, which is made specific by the instrument or decree. \* \* \*

(b) *Alimony income attributable to property*.—The full amount of periodic payments received under the circumstances described in section 22 (k) is required to be included in the gross income of the recipient whether such amounts are derived, in whole or in part, from income received or accrued by the source to which such payments are attributable. Thus, it matters not that such payments are attributable to property in trust, to life insurance, endowment, or annuity contracts, or to any other interest in property, or are paid directly or indirectly by the obligor husband from his income or capital. For example, if in order to meet an alimony obligation of \$500 a month, the husband purchases or assigns for the benefit of his former wife a commercial annuity contract paying such amount, the full \$500 a month received by the wife is includible in her income, and no part of such amount is includible in the husband's income or deductible by him. See section 22 (b) (2) (A) and section 29.22 (b) (2)–4. Likewise, if property is transferred by the husband, subject to an annual charge of \$5,000, payable to his former wife in discharge of his alimony obligation under the divorce decree, the \$5,000 received annually is, under section 22 (k), includible in the wife's income, regardless of whether such amount is paid out of income or principal of the property.

The same rule applies to periodic payments attributable to property in trust. The full amount of periodic payments to which section 22 (k) applies is includible in the wife's income, regardless of whether such payments are made out of trust income. This rule applies even though under the law applicable to taxable years beginning before January 1, 1942, only the income of a trust for the benefit of the divorced wife was taxable to her. Such periodic

payments are to be included in the wife's income under section 22 (k) and are to be excluded from the husband's income, even though the income of the trust would otherwise be includible in his income under section 22 (a), section 166, section 167, or any other section of the Code or these regulations. As to periodic payments received by a former wife attributable to property in trust in cases to which section 22 (k) does not apply because the husband's obligation is not specified in the decree or an instrument incident thereto, see section 171 (a) and section 29.171-1.

\* \* \* \* \*

SEC. 29.23 (u)-1. *Periodic Alimony Payments*.—A deduction is allowable under section 23 (u) with respect to periodic payments in the nature of, or in lieu of, alimony or an allowance for support actually paid by the taxpayer, during his taxable year and required to be included in the income of the payee wife or former wife as the case may be, under section 22 (k). As to the amounts required to be included in the income of the wife or former wife, as the case may be, see section 29.22 (k)-1. (For definition of husband and wife in such cases, see section 3797 (a) (17).)

The deduction is allowed only for such amounts as are actually paid on or after January 1, 1942, in a taxable year of the wife or former wife beginning after December 31, 1941. For this purpose, the taxpayer is treated as if he makes his income tax returns on the cash receipts and disbursements basis, regardless of the method of accounting actually employed by him in making such returns.

The deduction under section 23 (u) is allowed only to obligator or spouse. It is not allowed to an estate, trust, corporation, or any other person who may pay the alimony obligation of such obligor spouse. The obligor spouse, however, is not allowed a deduction for any peri-



odical payment includible under section 22 (k) in the income of the wife or former wife, as the case may be, which payment is attributed to property transferred in discharge of his obligation and which, under section 22 (k) or section 171 is stated not to be includible in his gross income.

\* \* \* \* \*

SEC. 29.162-1. *Income of Estates and Trusts.*—In ascertaining the tax liability of the estate of a deceased person or of a trust, there is deductible from the gross income, subject to exceptions, the same deductions which are allowed to individual taxpayers. See generally section 23, and the provisions thereof governing the right of deduction for depreciation and depletion in the case of property held in trust. Amounts allowable under section 812 (b) as a deduction in computing the net estate of a decedent are not allowed as a deduction under section 23, except subsection (w), in computing the net income of the estate unless there is filed in duplicate with the return in which the item is claimed as a deduction a statement to the effect that the items have not been claimed or allowed as deductions from the gross estate of the decedent under section 812 (b) and a waiver of any and all right to have such item allowed at any time as a deduction under section 812 (b).

\* \* \* \* \*

SEC. 29.171-1. *Income of Trust in Case of Divorce, etc.*—(a) *In general.*—Section 171 (a) provides rules in certain cases for taxability of income of trusts as between spouses who are divorced or legally separated under a court order or decree. In such cases, the spouse actually entitled to receive payments from the trust is considered the beneficiary rather than the spouse in discharge of whose obligation such payments are made. For convenience, the beneficiary spouse will hereafter in this section and

in section 29.171-2 be referred to as the “wife” and the obligor spouse from whom she is divorced or legally separated as the “husband.” (See section 3797 (a) (17).) Thus, under section 171 (a) income of a trust—

(1) which is paid, credited or to be distributed to the wife in a taxable year of the wife, and

(2) which, except for the provisions of section 171, would be includible in the gross income of her husband, shall be includible in her gross income and shall not be includible in his gross income.

Section 171 (a) does not apply in any case to which section 22 (k) applies. Although section 171 (a) and section 22 (k) seemingly cover some of the same situations, there are important differences between them. Thus, section 171 (a) applies, for example, to a trust created before the divorce or separation and not in contemplation of it, while section 22 (k) applies only if the creation of the trust or payments by a previously created trust are in discharge of a legal obligation imposed upon or assumed by the husband (or made specific) under the court decree or an instrument incident to the divorce or legal separation. On the other hand; section 22 (k) requires inclusion in the wife’s income of the full amount of periodic payments received attributable to property in trust (whether or not out of trust income), while section 171 (a) requires amounts paid, credited or to be distributed to her to be included only to the extent such amounts are out of income of the trust for its taxable year (determined as provided in section 162).

Section 171 (a) is designed to produce uniformity as between cases described in section 171 (a) and cases not described in section 171 (a), where, in the former cases, without section 171 (a), the income of a so-called alimony trust would be taxable to the husband because of his

continuing obligation to support his former wife, and where, in the latter cases, the income of a so-called alimony trust is taxable to the former wife because of the termination of the husband's obligation. Furthermore, section 171 (a) taxes income to the wife in all cases where under prior law the husband would be taxed not only because of the discharge of his alimony obligation but also because of his retention of control over the income or trust corpus. Section 171 (a) applies whether or not the wife is the beneficiary under the terms of the trust instrument or is an assignee of a beneficiary.

\* \* \* \* \*

SEC. 29.171-2. *Application of Trust Rules to Alimony Payments.*—For the purpose of the application of sections 162, 163, and 164, the wife described in section 171 or section 22 (k) who is entitled to receive payments attributable to property in trust is considered a beneficiary of the trust, whether or not the payments are made for the benefit of the husband in discharge of his obligations.

\* \* \* \* \*



No. 11686.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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ESTATE OF HOMER LAUGHLIN, Deceased.

BEACH D. LYON, Administrator with the Will Annexed,  
*Petitioner,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

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## PETITIONER'S REPLY BRIEF.

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---

## PETITIONER'S REPLY BRIEF.

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Respondent, pursuant to leave of court granted February 2, 1948, withdrew his brief filed in October, 1947, and substituted a new brief, which takes positions differing in important respects from, and in part inconsistent with those taken in his former brief. It has therefore seemed desirable in the interest of clarity to file an entirely new reply brief, even though the argument herein contained necessarily parallels and in part duplicates that contained in the reply heretofore filed.

We shall give primary attention to the last brief filed by respondent, giving minimum heed to his former contentions. It is proper to note that in both his earlier and later arguments in this Court, he has devoted most of his attention to a point—that dealing with the effect of Sections 22(k) and 23(u) of the Internal Revenue Code—

which in the Tax Court he esteemed of so little worth as not to justify mention. It is perhaps no compliment to us that the Tax Court, unaided by respondent, came to his rescue regarding this matter. Fortified by this perhaps unexpected assistance, he now relies heavily upon the point that an estate is under no circumstances entitled to the benefits permitted to living taxpayers under the provisions of those sections.

## ARGUMENT.

### I.

#### **The Pertinent Provisions of the Internal Revenue Code Apply to and Support the Claimed Deduction.**

We agree with respondent (Br. p. 8) that "the critical connection between Section 162(b) deductions and the basic alimony provisions is made by Section 171(b) of the Code" (quoted Pet. Op. Br. p. 8). We note respondent's concession (Br. p. 9) that if Ada Edwards Laughlin is a "wife" as described in Sections 22(k) and 171(a) of the Code (required therefore to include the present payments in her taxable income), then Section 171(b) makes her a "beneficiary specified in this supplement," that is, a Section 162(b) "beneficiary, payments to whom are proper deductions." We do not sponsor the proposition (see Resp. Br. p. 9) that "*all* payments to divorced wives by the estates of deceased ex-husbands are payments to Section 162(b) 'beneficiaries.'" We quite agree with respondent (pp. 9-10) that repayments by the estate to the wife, of a loan made by her, would not be deductible. The same rule would apply to debts generally. (See *Trust Estate of Thomas Lonergan*, 6 T.

C. 715, cited in respondent's earlier brief, p. 20.) The absence of any parallel between such cases and the present is obvious.

When we come to the *interpretation* of the "basic provisions" referred to by respondent (p. 10)—the so-called "alimony" provisions, in conjunction with Sections 162(b) and 171(b)—we part company with him. The use of the terms *estate or trust* in Section 171(b) was due to no inadvertence. Those terms are used several times by both the Senate and House Committees in reporting on these amendments. (For the Senate Committee Report, see 1942-2 C. B. 568-570, quoted in part, Pet. Op. Br. pp. 12-13; for the House Report, see 1942-2 C. B. 427-429.) Congress was fully cognizant of the fact that it was legislating regarding the "beneficiary" of an estate—a somewhat unusual use of language, but by no means unintelligible; producing in fact no ambiguity to an intelligent layman or anyone not having the lawyer's critical ear for the legally exact word.

Respondent *correctly* says (p. 12), that "the estate of Homer Laughlin owes Mrs. Laughlin a general obligation, or annuity." So did Homer Laughlin while living, and yet if the 1942 legislation had been passed before he died, he would have been entitled to deduct the \$9600 payments. This argument, like that in respondent's former brief (p. 7) based on the "capital" nature of the payments, proves too much.

Respondent *incorrectly* says (p. 12) that this obligation is "in the nature of a substitute for dower rights which she gave up in the contract of April 1, 1924." Perhaps respondent was misled by a superfluous reference to "dower" in the Agreement between the Laughlins [R.

53 at 60], but the fact is there are no dower rights in California, and Mrs. Laughlin couldn't give up something she never had. At pages 6 and 7 of our opening brief, we called attention to the fact that property rights do not enter into this controversy. It was stipulated [R. 38]:

“(15) Homer Laughlin, Jr., did not possess on April 1, 1924, or at any time thereafter during the continuance of the marriage between him and Ada Edwards Laughlin, any substantial amount of community property, his property consisting of property given to him by or inherited by him from his father, Homer Laughlin, Sr.”

To a court sitting in California, we need not emphasize the fact that Homer Laughlin's property, being separate, was his to dispose of as he saw fit.<sup>1</sup> In so far as respondent's position rests on the contrary assumption, it falls by its own weight.

Respondent argues (p. 12) that Homer Laughlin's obligation having outlasted his life, it is not an “alimony” or “support” obligation; that therefore (in effect), the payments made pursuant to it do not come within Section 22(k) at all. At the risk of repetition, let us reexamine the facts of the present case in the light of Section 22(k) in an effort to ascertain whether the case fits the statutory requirements.

First, we have a “wife,” Ada Edwards Laughlin, “who is divorced \* \* \* from her husband under a decree

---

<sup>1</sup>Probate Code, Section 20, as it read in 1932, when Homer Laughlin died:

§20. WHO MAY MAKE WILL: [SEPARATE PROPERTY: SOUNDNESS OF MIND: AGE]. Every person of sound mind, over the age of eighteen years, may dispose of his or her separate property, real and personal, by will.

of divorce”; second, we have “periodic payments” received “in discharge of \* \* \* a legal obligation which because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce.”

The obligation incurred by Homer Laughlin conforms to these requirements, and there is no other requirement. Respondent in implying that the payments must be strictly for “alimony,” reads something into the statute that isn’t there. Congress, presumably with intent, used neither the word alimony nor support (except as to support of minor children).<sup>2</sup> Recognizing that the husband’s obligation might be different from, perhaps broader than alimony, Congress refused to place such a limitation upon it, specifying merely that the obligation be caused by the marital relationship (as here), that it be *imposed upon* the hus-

---

<sup>2</sup>Section 6 of Public Act No. 1, 76th Congress, approved February 10, 1939, provides:

Sec. 6. The arrangement and classification of the several provisions of the Internal Revenue Title have been made for the purpose of a more convenient and orderly arrangement of the same, and, therefore, no inference, implication or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion thereof, nor shall any outline, analysis, cross-reference, or descriptive matter relating to the contents of said Title be given any legal effect:

The heading “Alimony, etc., Income,” to Section 22(k) seems to be “descriptive matter,” not to be given any legal effect. Irrespective of this, it is well established as a matter of the general law of statutory construction that although the title to an act may be looked at in case of “ambiguity” (there is none here), it “will not limit the plain meaning of the text” (*Maguire v. Commissioner*, 313 U. S. 1, 9, 85 L. Ed. 1149, 61 S. Ct. 789; *Strathearn Steamship Co. v. Dillon*, 252 U. S. 348, 64 L. Ed. 607, 40 S. C. 350).

band (by a court, for example), or *be incurred* by him under a decree or written instrument (both are present here).

This is sufficient to distinguish *Parker v. Parker*, 193 Cal. 478, 225 Pac. 477, cited by respondent, and similar cases. In fact, that case, upholding as it does the legality in California of the kind of obligation, not strictly for alimony, that is here presented, is an authority for, rather than against the petitioner.

We confess our inability to see the relevancy of respondent's argument, pages 14 to 16, to the effect that the construction he contends for "will be consistent with the treatment accorded to separation agreement obligations under the estate and gift tax laws." To begin with, the claimed consistency is not manifest. Under state law, a promissor such as Homer Laughlin is bound by his promise, regardless of whether the federal taxing authorities, weighing his support obligation in their own special scales, decide that he has obligated himself to pay too much, and has therefore made a gift as to the excess. The existence here of a valid and enforceable obligation is not in dispute. If such an obligation were lacking, the Court's time would not be taken up with this controversy. We do not understand respondent to say that he could deny Homer Laughlin, if living, a full deduction because, in respondent's opinion, Laughlin had agreed to pay too much. Sections 22 (k) and 23 (u) contain or suggest no such limitation and we suggest none can be implied.

In the second place, respondent is asking here for a consistency which is often lacking in the operation of the revenue laws. For example, a person who by reason of the death of a decedent acquires the right to receive an

amount which would have been income if received by the decedent, is taxable on the amount as though it were income to him (§ 126, I. R. C.), although obviously it is a legacy or inheritance.<sup>3</sup> A man who distributes portions of his property among his family, who thereupon embark the same property in a partnership with the donor, makes valid, taxable gifts; but the law does not always give them recognition for income tax purposes.<sup>4</sup> Similarly, under the doctrine of *Helvering v. Clifford*, 309 U. S. 331, a grantor may remain taxable on the income from transferred property, but nevertheless incur a gift tax on the transfer.<sup>5</sup> He may remain taxable on the income from transferred property, but *not* be liable for a gift tax on the income paid over to the beneficiaries pursuant to the terms of the same transfer.<sup>6</sup> A “gift” for estate or gift tax purposes may be a “purchase” for income tax purposes.<sup>7</sup> There is no provision more inconsistent with ordinary concepts of what constitutes income than that we are now considering, under which payments admittedly out of capital are considered and taxed as income (Reg. 111, Sec. 29.22(k)-1(a), last paragraph).

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<sup>3</sup>*Cf. Hazel Kirk Carlisle*, 8 T. C. 563, 568, aff’d., C. C. A. 6, Feb. 3, 1948.

<sup>4</sup>*Commissioner v. Tower*, 327 U. S. 280, 90 L. Ed. 670 (1946); *Lusthaus v. Commissioner*, 327 U. S. 293, 90 L. Ed. 679 (1946).

<sup>5</sup>*Commissioner v. Prouty*, 115 F. (2d) 331, 25 A. F. T. R. 986 (C. C. A. 1, 1940); *Commissioner v. Beck’s Estate*, 129 F. (2d) 243, 29 A. F. T. R. 809 (C. C. A. 2, 1942).

<sup>6</sup>*Commissioner v. Hogle*, ..... F. (2d) ..... (C. C. A. 10, Dec. 26, 1947).

<sup>7</sup>*Farid-Es-Sultaneh v. Commissioner*, 160 F. (2d) 812 (C. C. A. 2, 1947).

On page 16, respondent, referring to the \$800 per month payments made by Homer Laughlin during his lifetime, says:

“\* \* \* They are therefore deductible, whether made by the husband, or from estate or trust funds, by the payor, and are includible in the wife’s return, under the new alimony provisions. Internal Revenue Code, Sections 22 (k), 23 (u) and 171 (b).”

As to this, query: What is meant by payments made “from *estate* \* \* \* funds”? How could the *living* husband have an “estate” from which the payments could be made? Congress could hardly have contemplated such an absurdity. If respondent means what he seems to say, we needn’t go any further.

Respondent’s next statement, paragraph (b), page 16, states a general conclusion which we shall not attempt to repel here, as our entire argument runs contrary to the conclusion that the “annuity” payments made by the Laughlin estate are not “*related to the husband’s support obligation,*” and are consequently not deductible. On the contrary, we contend that the payments are made “in discharge of \* \* \* a legal obligation which *because of the marital* \* \* \* *relationship* is imposed upon or incurred by the husband.” Homer Laughlin, in agreeing to pay \$800 per month, was not acting solely out of kindness of heart. He “incurred” this liability “because of the marital relationship.” We have already sufficiently adverted to respondent’s attempt to whittle down this broad language to make it fit into a narrow concept or purely “support” or “alimony” obligations. This argument, like respondent’s former argument, now discarded, based on the “capital” nature of the expenditures, proves too much. It would tend to prove that



Homer Laughlin would not have been entitled to deduct the \$300 per month which would have been payable [R. 54] in the event of Mrs. Laughlin's remarriage—a position which seems clearly untenable.

We are not unduly disturbed by the “practical results” referred to in respondent's brief, page 17, if petitioner's position is sustained. In particular, the suggestion, page 17, that denial of the deduction will create pressure for settlement of the matter as between the estate and the annuitant, is not impressive in a case where the estate and the annuitant struggled along for some ten years after Homer Laughlin's death in 1932 without benefit of deduction (none being allowed by law) and without a “settlement.” We submit that the number of cases of this kind is relatively small; and further, that this species of encumbrance on estate administration must necessarily be contemplated by those who become parties to such arrangements.

We refer now to the “incidental notes” to the government's main argument, pages 17 to 21.

1. *Uniformity.*—We make no contention opposed to the uniform operation of the statute.

2. *Taxability of Mrs. Laughlin.*—Ada Edwards Laughlin is, we submit, taxable on the \$9600 payments, and by reason of Section 22 (k) of the Code. That is the whole point of the present case.<sup>8</sup> Naturally, Mrs. Laughlin is not concluded by the decision here, and no judgment can be rendered which will affect her, except

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<sup>8</sup>The respondent concedes that Mrs. Laughlin would be taxable if Homer Laughlin were alive. (Resp. Br. p. 16.) No adequate reason is suggested why his death should convert taxable income into a non-taxable receipt.

indirectly and as a precedent. Every decision the Court hands down affects numerous people in that way and to that extent.

We question the statement in Note 3, page 19, of respondent's brief, to the effect that "the estate obligation results from a gift to Mrs. Laughlin as of April 1, 1924." Mrs. Laughlin received no gift in 1924; what she got was a promise to pay money in discharge of an obligation then imposed upon or incurred by her husband. Unless Homer Laughlin was bound by that promise, we have no case.

3. *Section 162 (d).*—(Resp. Br. p. 19.) We are in agreement with the concessions made, as far as they go.

4. *Reg. 111, Sec. 29.23(u)-1.*—(Resp. Br. p. 20.) We endeavored—with no notable success so far as the Tax Court is concerned—to reconcile Section 29.22(k)-1 (a) and 29.23(u)-1 of respondent's regulations. The Tax Court (R. 110; p. 44 of 8 T. C.) says the last cited regulation is "apparently in conflict with what petitioner contends." The government (p. 20) now concedes the inapplicability of Section 29.23(u)-1, rendering it unnecessary for the Court to consider the argument advanced in our opening brief (pp.10-11), relating to this subject matter.<sup>9</sup>

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<sup>9</sup>In his earlier brief, page 13, respondent said that our effort "to construe this Regulation as inapplicable to the case where the estate of the deceased husband makes the payments, strains common sense. Actually, taxpayer's contention is that this Regulation is invalid for conflict with Section 171(b) of the Code." Respondent now says (Br. p. 20) that "the government places no reliance upon the above provision and submits that it is not relevant to the present question \* \* \*." Since we are unable to draw a distinction between what is "not relevant" and what is "inapplicable," we assume this amounts to a recession from respondent's former position and from his characterization of the position we took.

## II.

### The Estate Tax Deduction.

As pointed out in our opening brief (p. 16), the estate tax deduction with which we are now charged is somewhat illusory. Passing that point, and assuming that the estate had, or should have had a deduction in some amount on account of Ada Edwards Laughlin's claim, we believe there are two answers to respondent's contention: First, the payment of *this kind of a debt* gives the right to a deduction. This is admittedly so in *inter vivos* transactions. We believe the same result to be required as to payments by decedents' estates, the requirements of Sections 22 (k), 162 (b), 162 (d) (1), and 171 (b) being satisfied. Second, the statute expressly permits this kind of "duplication" of deductions, just as it permits sums paid to a divorced wife out of capital to be treated as deductions to the payor and income to the payee.

Section 162 (e), referred to in respondent's brief, page 22, is not apropos here for the reasons, first, that this statute, enacted in 1942, is prospective in its application, inapplicable to the estate of a man then ten years deceased. The section shows on its face (by its reference to filing a waiver of the right to have the items in question allowed as deductions under Section 812 (b)) that it can apply only prospectively, to cases where such waiver is possible.<sup>10</sup>

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<sup>10</sup>The above construction is supported by Section 161(b), Revenue Act of 1942. Referring to Section 162(e), I. R. C., added by Section 161(a) of the Act, Section 161(b) says:

"(b) Taxable Years to Which Amendment Applicable.—  
The amendment made by subsection (a) in so far as it relates

In the second place, Section 162 (e) cannot have the effect of disallowing as a deduction items expressly made deductible from the estate's income under the provisions of Sections 162 (b), 162 (d) (1) and 171 (b). If, as we believe, we are entitled to a Section 162 (b) deduction, we don't need a Section 23 deduction, and Section 162 (e), which refers only to the latter type of deduction doesn't apply. Supplement E (Sections 161 to 172) provides a code relative to deductions of estates and trusts,

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to section 23(a)(2) shall be applicable with respect to the same taxable years and the same revenue laws as the amendments made by section 121 (relating to non-trade or non-business deductions) of this Act; and the other provisions shall be applicable to taxable years beginning after December 31, 1941."

Section 23(a)(2), referred to in the foregoing excerpt, added by Section 121 of the 1942 Act, provides for deductibility of the following:

"(2) Non-Trade or Non-Business Expenses.—In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income."

This provision was made retroactive generally, as follows (Section 121(e), 1942 Act):

"\* \* \* \* \*

"For the purposes of the Revenue Act of 1938 or any prior Revenue Act the amendments made to the Internal Revenue Code by this section shall be effective as if they were a part of such Revenue Act on the date of its enactment."

The above shows that Congress had the question of retroactivity in mind; and that it could have contemplated the applicability of Section 162(e) only where the estate tax matter was still open and the question of deductions undetermined.

allowing some deductions *additional* to those granted to individuals. Section 171 (b) contains no mention of Section 23 (u). It refers only to a Section 22 (k) “wife,” and says, in effect, that distributions from an estate or trust to such a “wife” are deductible. This is a particular provision relative to this particular subject matter.

To construe this provision in accordance with respondent’s contention would be to permit the general provision to govern the particular, contrary to a familiar canon of statutory construction (*Townsend v. Little*, 109 U. S. 504, 512, 27 L. Ed. 1012; *Virginian Railway Co. v. System Federation No. 40*, 300 U. S. 515, 563, 81 L. Ed. 789). The construction would, we submit, constitute a departure from the intent of Congress, which is to regard an estate, during the period of its administration, as a continuing entity, governed as to income taxes by rules comparable to those which obtain in the case of trusts, as to which Supplement E establishes a special and (except as it includes other sections by reference) a complete code.

Section 162 (e), we submit, refers to those claims against an estate whose entire income tax effect is determinable *in limine*, *not to recurring obligations such as the Ada Edwards Laughlin claim*. The fact that the claims referred to are those deductible in determining the estate tax—a definite and non-recurring event—seems to confirm this.

The fact that it is impossible under given circumstances to comply with a prescribed condition furnishes some indication that the condition is not intended to apply to those circumstances. In the present case, the estate tax return was due March 27, 1934 [R. 32]. For the taxpayer, making its 1942 return on March 15, 1943, to have filed a waiver of its right to a deduction on an estate tax return filed almost nine years before, would have been a little ridiculous. Congress plainly never contemplated a gesture so futile, and one so incapable of becoming in any manner effective.

The Commissioner, in 1939, claimed an estate tax deficiency of \$5,954.94 on the theory that his earlier allowance of a deduction for the commuted value of the Ada Edwards Laughlin claim was erroneous [R. 69-71]. The income tax deficiency resulting from the disallowance of the \$9600 as a deduction is \$7,077.09 *for the year 1942 alone* [R. 119]. Assuming a comparable amount to be involved for the remaining years of Ada Edwards Laughlin's life, it is manifest that petitioner is paying a big price for the small tax benefit received by the estate some fifteen years ago. If the equities of the case enter into the picture at all, it would seem that petitioner should at most be charged with only \$5,954.94. It might be difficult to find technical justification for such a result. But it would eliminate in a rational manner the "double deduction" of which respondent complains.

### Conclusion.

From the confusion of the present debate, one luminous fact emerges. Ada Edwards Laughlin is a "wife," the "beneficiary" of an "estate," as those terms are used in Section 171 (b) or those terms have no meaning in that context. In two tries in this Court, respondent has brought forward no adequate explanation of this language. Unless Ada Edwards Laughlin is a "wife" who is the "beneficiary" of an "estate," within the meaning of Section 171(b), that particular part of the statute seems to have no significance. It will require something more than a decision of the Tax Court, bolstered by the respondent's interested though somewhat belated support, to convince us that Congress made so futile a gesture.

We respectfully submit that the decision of the Tax Court should be reversed.

Respectfully submitted,

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